Jurisdictional Statement

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1981

REPUBLICAN NATIONAL COMMITTEE, TIRSO DEL JUNCO, CHAIRMAN, CALIFORNIA REPUBLICAN PARTY,
Appellants,

v.

PHILLIP BURTON, et al.,
Appellees.

On Appeal from the Supreme Court of California

Jurisdictional Statement

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QUESTIONS PRESENTED

1. Has 2 U.S.C. § 2a(c)(2) (which provides for the use of existing districts and at-large elections for additional representatives until a state has been redistricted pursuant to a reapportionment) been impliedly repealed by 2 U.S.C. § 2c (which provides for the establishment of single-member districts pursuant to a reapportionment)?

2. Did the California Supreme Court err by failing to comply with 2 U.S.C. § 2a(c)(2) and by ordering instead that the 1982 California congressional elections be held in the 45 districts approved by the Democratic majority in the California Legislature in Assembly Bill 301, which districts have never gone into effect because they were stayed by a certified referendum petition challenging their gerrymander?

THE PARTIES TO THE PROCEEDING BELOW

The parties to the proceedings below in the California Supreme Court are Phillip Burton, Anthony Beilenson, George E. Brown, Jr., John Burton, Tony Coelho, George E. Danielson, Ronald V. Dellums, Julian Dixon, Mervyn Dymally, Don Edwards, Vic Fazio, Augustus Hawkins, Tom Lantos, Robert Matsui, George Miller, Norman Mineta, Leon Panetta, Jerry Patterson, Edward R. Roybal, Fortney (Pete) Stark, Henry A. Waxman, individually and as twenty-one members of the United States House of Representatives; Thelma Teresa Susskind, and Victor Manuel Botello, petitioners below; March Fong Eu, Secretary of State of the State of California, and George Deukmejian, Attorney General of the State of California, respondents below; Tirso Del Junco, Chairman, California Republican Party, Republican National Committee, real parties in interest below; and Eugene A. Chappie, Don H. Clausen, Paul N. McCloskey, Jr., Norman D. Shumway, Charles Pashayan, Jr., William M. Thomas, Robert J. Lagomarsino, Barry Goldwater, Jr., Bobbi Fiedler, Carlos J. Moorhead, John J. Rousselot, Robert K. Dornan, Wayne Grisham, Dan Lungren, Dave Dreier, Jerry Lewis, William E. Dannemeyer, Robert E. Badham, Bill Lowery, Duncan L. Hunter, Clair W. Burgener, intervenors below.

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Appellees.

On Appeal from the Supreme Court of California

Jurisdictional Statement

Appellants Republican National Committee ("RNC"), and Tirso Del Junco, Chairman, California Republican Party ("California Republican Party") appeal from the judgment of the Supreme Court of California, dated and entered as final on January 28, 1982, in mandate proceeding S.F. 24354 (consolidated with mandate proceedings S.F. 24348, S.F. 24349, S.F. 24356), holding that 2 U.S.C. § 2a(c) was impliedly repealed by 2 U.S.C. § 2c and therefore did not control its determination as to which districts should be used for the 1982 congressional elections pending the completion of the state's establishment of new districts pursuant to the decennial reapportionment.

THE OPINION BELOW

The opinion of the Supreme Court of the State of California rendered on January 28, 1982 is reported at 30 Cal.3d 638, ____ Cal.Rptr. __ (Jan. 28, 1982), reprinted in the Appendix, A-1-63.

JURISDICTION

The judgment of the Supreme Court of California was entered as final on January 28, 1982 in the exercise of its original jurisdiction in a consolidated mandate proceeding pursuant to Cal. Const. art. VI, § 10.

A Notice of Appeal to this Court was duly filed in the Supreme Court of California on February 16, 1982 (reprinted in the Appendix at A-64-67). This appeal is being docketed in this Court within 90 days from the entry of the final judgment below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(1) on the grounds that the decision of the California Supreme Court was against the validity of 2 U.S.C. § 2a(c) in that it found that the statute was impliedly repealed. In the alternative, appellants request that the Court treat this appeal as a petition for writ of certiorari pursuant to 28 U.S.C. § 2103.

STATUTORY PROVISIONS INVOLVED

This case involves Sections 2a(c)(2) and 2c of Title 2 of the United States Code.

Section 2a(c)(2) prescribes which districts should be used for the interim period until a state has been redistricted after a decennial reapportionment:

> (c) Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: (1) If there is no change in the number of Representatives, they shall be elected from the districts then prescribed by

> the law of such State, and if any of them are elected from the State at large they shall continue to be so elected; (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State. . . .

2 U.S.C. § 2a(c)(2).

Section 2c, on the other hand, picks up where Section 2a(c) ends and provides for the appropriate manner of establishing districts pursuant to the decennial reapportionment:

> In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment made pursuant to section 2a(b) of this title, there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative (except that a State which is entitled to more than one Representative and which has in all previous elections elected its Representatives at Large may elect its Representatives at Large to the Ninety-first Congress).

2 U.S.C. § 2c.

STATEMENT OF THE CASE

In September, 1981 the Democratic majority of the California Legislature passed three apportionment statutes which established new districts for the State Senate, State Assembly and U.S. Congress pursuant to the 1980 census. Assembly Bill 301—which was not authored by the California State Assembly but by Congressman Phillip Burton (hereinafter referred to as the "Burton Plan")—established 45 new congressional districts to which California was entitled after the 1980 census, a gain of

two seats since the 1970 census. It was passed by a partisan vote on September 11, 1981, the same day on which the only Assembly hearings on the bill took place, without any meaningful debate: Only one set of district maps existed and they remained in the sole possession of Congressman Burton despite requests by legislators for an opportunity to review the proposed districts prior to the vote. The Burton Plan was a clear gerrymander of the congressional districts. Its probable impact would be the election of 28 Democrats and only 17 Republicans, a net increase of six Democrats. Despite the lack of meaningful hearings or distribution of maps, Governor Jerry Brown signed the bill.

On September 16, 1981, appellants RNC and the California Republican Party began a petition drive to qualify a referendum challenging each of the redistricting statutes, including the Burton Plan. If unchallenged, the new districts would have gone into effect as of January 1, 1982. However, under California law, the filing of a valid referendum stays implementation of the challenged statute until the electorate has an opportunity to approve it. Cal. Const. art. II, § 10(a).

On or around November 2, 1981, the appellee Democratic Congressmen filed in the California Supreme Court a petition for a writ of mandate requesting that the Court exercise its original jurisdiction pursuant to the provisions of Article VI, Section 10 of the California Constitution and Rule 56(a) of the California Rules of Court.[1] They requested that the court enjoin the processing of the referendum petitions and compel the use of the Burton Plan for the 1982 elections regardless of the validity of the referendum petitions.

On November 18, 1981, appellants submitted their completed referendum petitions to the Secretary of State. On December 15, the Secretary of State certified that the petitions contained the requisite number of signatures (equalling five percent of the votes cast for all candidates for governor at the last gubernatorial election) and thereby qualified for the June,

[1] Other petitions for a writ of mandate with respect to the Senate and Assembly districts (S.F. 24348, S.F. 24349, S.F. 24356) were also filed and were subsequently consolidated with the instant mandate proceeding (S.F. 24354).

1982 ballot, subject to the California Supreme Court's resolution of the mandate proceedings. Indeed, 798,470 signatures were certified for the referendum challenging the Burton Plan, although only 346,119 signatures were necessary, a reflection of the California electorate's opposition to the gerrymandering.

The California Supreme Court upheld the validity of the referendum petitions and reaffirmed its previous rulings that the filing of a valid referendum challenging a statute stays its implementation until after the vote of the electorate pursuant to Cal. Const. art. II, § 10(a).

However, despite the stay, the California Supreme Court directed the use of the challenged congressional districts for the 1982 congressional elections, regardless of the outcome of the referendum. This, of course, meant that even if the voters rejected the Burton Plan in June, its districts would still be used for the subsequent November election. Moreover, recent polls show that 63% of Californians would vote to reject the gerrymandered Burton plan, and only 19% would vote to approve them. (California Field Poll, reported in Los Angeles Times, Feb. 24, 1982, Pt. 1, at 3.)

Appellants argued in their briefs submitted in opposition to the petition for writ of mandate that federal law—2 U.S.C. § 2a(c) (2)—required that the California Supreme Court order that the congressional elections be run in the presently existing 43 districts and two at-large districts pending the outcome of the referendum. Section 2a(c)(2) provides that "[u]ntil a State is redistricted in the manner provided by the law thereof after any apportionment. . .if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State. . . . ."

The California Supreme Court held that Section 2a(c)(2) had been impliedly repealed by 2 U.S.C. Section 2c. Section 2c provides that when a state is redistricted it must establish a number of districts equal to the number of representatives to which the state is entitled.

In their briefs and at oral argument, appellants contended that Section 2a(c)(2) was entirely consistent with Section 2c: Section 2c picks up where Section 2a(c)(2) ends and provides for the appropriate manner of establishing districts pursuant to a reapportionment, whereas Section 2a(c)(2) simply provides that *until* a state has been redistricted after a decennial reapportionment its representatives must be elected from the existing districts, with additional representatives being elected at large. Appellants noted that Congress had not repealed Section 2a(c) when it enacted Section 2c, although an earlier but unsuccessful version of Section 2c which was debated that year did provide for such a repeal. Furthermore, they argued that the predecessor versions of Sections 2a(c)(2) and 2c had been enacted simultaneously in the Act of Congress of August 8, 1911, ch. 5, §§ 3 and 4, 37 Stat. 13, 14 (1911), demonstrating that the sections were not repugnant and were intended to be read side-by-side. Appellants further contended, *inter alia,* that repeal by implication is disfavored and that a statute should not be construed as repealing prior acts on the same subject in the absence of express repeal, unless there is an irreconcilable repugnancy between them. *United States* v. *Greathouse,* 166 U.S. 601, 605, 41 L.Ed. 1130 (1897).

Nonetheless, the California Supreme Court held that Section 2a(c)(2) had been impliedly repealed, thereby deciding against the validity of a federal statute. The California Supreme Court's invalidation of Section 2a(c)(2) not only freed it from complying with federal law but also permitted it to intervene early in the legislative process—which was still continuing and before stalemate—in order to impose its own congressional districts, which were the very same gerrymandered districts which were stayed by the referendum. Appellants will move this Court for an expedited hearing to determine the validity of Section 2a(c)(2), an issue which promises to be a recurring one.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL AND REQUIRE PLENARY CONSIDERATION

A. The Questions Are Important

1. The Issue Of The Validity Of Section 2a(c) (2) Will Be A Recurring One.

Reapportionment of the U.S. House of Representatives takes place every ten years in accordance with the results of the decennial census. However, the mechanics of the reapportionment process are such that a state's redistricting of its congressional districts may not always be completed in time for the first congressional elections after the census. Section 2a(c)(2) fills the gap by prescribing the use of the existing districts, plus at-large elections for additional representatives, for the interim period before a state has been redistricted.[2]

Under the law, a state will only have somewhat more than a year to draft, debate, enact, and place into operation new districts following reapportionment and before the next congressional elections. Under 13 U.S.C. § 141(a), the decennial census was to be taken on the first day of April, 1980, and every ten years thereafter; however, the tabulations need not be completed until nine months after the census date, 13 U.S.C. § 141(b). The new apportionment, based on the census tabulations, was to be transmitted to the Congress (and thereafter the states) at the commencement of the first regular session of Congress in 1981, and each ten years thereafter. 2 U.S.C. § 2a. Accordingly, in 1981, legislatures had approximately a little more than a year to redistrict their states in time for the 1982 primary elections.

In those states, like California, where the right of referendum, or initiative, is available, a year is clearly insufficient time to redistrict where the electorate seeks to invoke those rights

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[2] Section 2a(c)(2) is quite narrow. It only provides for the use of existing districts (and at-large elections for additional representatives) before a state has been redistricted pursuant to a decennial census; therefore, it is not properly invoked *after* the state has been redistricted, even if the redistricting statute is subsequently held unconstitutional. It simply provides for interim relief for that brief period before a state adopts a new redistricting statute after a decennial reapportionment.

and participate in the legislative process. The redistricting process, in those instances, entails the enactment of a redistricting plan, a referendum election, and if necessary, the adoption of a new plan depending upon the outcome of the referendum, a process which will take over a year. The right to referendum is not unique to California; as an outgrowth of the Progressive and Populist eras, twenty-one states provide for the right to referendum.

Section 2a(c)(2) therefore serves an important purpose of providing interim relief pending the completion of the essentially political process of redistricting—a process which a state, in following its constitutional and legislative procedures, may very well not be able to complete in time for the first election following a decennial census. Appellants are aware of three other states in which the issue of the validity of Section 2a(c), or a part thereof, has been litigated as a consequence of the 1981 reapportionment alone (Colorado, Michigan, and Missouri).[3]

By providing interim relief, Section 2a(c)(2) also enables the judiciary to avoid premature intervention in the ongoing redistricting process. A determination of the validity of Section 2a(c)(2) will limit the extent to which the judiciary must involve itself in this political process before the legislature has completed the task: Without the interim relief provided by Section 2a(c)(2), failure to redistrict before the first elections following a reapportionment makes judicial intervention inevitable.

2. This Court Should Rule On The Validity Of Section Section 2a(c)(2).

Sections 2a(c)(2) and 2c are complementary: Section 2c provides for the appropriate manner of establishing districts pursuant to a reapportionment whereas Section 2a(c)(2) prescribes which districts should be used for the interim period before the state has been redistricted.

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[3] *See Carstens* v. *Lamm*, No. 81-F-1713 (D. Colo. Jan. 28, 1982); *Agerstrand* v. *Austin*, No. 81-40256 (E.D. Mich. Feb. 26, 1982); *Shayer* v. *Kirkpatrick*, No. 81-4144-CV-C (W.D. Mo. Jan. 7, 1982).

This Court, in considering the predecessor version of Section 2a(c)(2), which was similar to present section, held that the statute was properly invoked before the state had been redistricted after a decennial census. *Smiley* v. *Holm,* 285 U.S. 355 (1932); *Koenig* v. *Flynn,* 285 U.S. 375 (1932). Referring to the predecessor version of Section 2a(c)(2), this Court stated:

> [W]e are of the opinion that under this provision, in the absence of the creation of new districts, additional representatives allotted to a State under the present reapportionment would appropriately be elected by the State at large. Such a course, with the election of the other representatives in the existing districts until a redistricting act was passed, would present no inconsistency with any policy declared in the act of 1911.

Smiley v. *Holm, supra,* 285 U.S. at 374.[4]

Moreover, this Court has recognized that the predecessor statute to Section 2a(c)(2) was drafted "to recognize the propriety of the referendum in establishing congressional districts." *Smiley* v. *Holm, supra,* 285 U.S. at 371. In the instant action, as well, a referendum is being utilized as part of the redistricting process, and until that process is completed, Section 2a(c)(2) should be invoked, as was its predecessor in *Smiley.*

However, this Court has not construed Section 2a(c)(2) since the enactment of Section 2c in 1967.[5] The opinion of the California Supreme Court holding that Section 2c impliedly

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[4] The viability of *Smiley* was not drawn into question by *Baker* v. *Carr,* 369 U.S. 186 (1962). Indeed, *Baker* v. *Carr* approvingly cited *Smiley.* 369 U.S. at 232-33.

[5] In *Whitcomb* v. *Chavis,* 403 U.S. 124, 158-59 n. 39 (1971), this Court, in dictum, referred to Section 2a(c) during a summary of the history of Section 2c. It indicated that the requirement of single-member districts continued from 1842 until 1929, noted that present day Section 2a(c) was enacted in 1941, and stated that in 1967 "Congress reinstated the single-member district requirement." However, this dictum did not address the validity of Section 2a(c), an issue which was not before this Court in that case.

repealed Section 2a(c), has eliminated this mandatory interim measure and has permitted the court to intervene early in the legislative process—while it is still continuing and before stalemate—in order to impose its own congressional districts. In this case, the California Supreme Court agreed that the Burton plan had been stayed by the referendum but nonetheless imposed those very same districts in contravention of Section 2a(c)(2).

Appellants submit that swift action may still allow the application of federal law since the court below recognized that the computer programming necessary for the implementation of the existing districts had already been accomplished. A-19. The viability of Section 2a(c)(2) is a recurring issue which has been raised in Colorado and is therefore an important question which merits review by this Court.

B. A Conflict As To The Validity of Section 2a(c)(2) Exists Between The Courts.

On the same day that the California Supreme Court held that Section 2a(c)(2) had been impliedly repealed, the United States District Court for the District of Colorado determined that Section 2a(c)(2) and Section 2c "are not necessarily inconsistent" and that "Section 2(a)(c)(2) provides emergency statutory relief from an otherwise unconstitutional situation." *Carstens* v. *Lamm,* No. 81-F-1713 (D.Colo. Jan. 28, 1982), slip op. at 10, the relevant portion of which is printed in the Appendix at A-68-80.

In *Carstens,* a three-judge court reviewed the same legislative history of Section 2c which was examined by the California Supreme Court and reached the conclusion that the congressional debates do not necessarily indicate a desire on the part of Congress to repeal Section 2(a)(c)(2).[6] A-79 & n.23. How-

[6] The court in *Carstens* noted the decision in *Shayer* v. *Kirkpatrick,* No. 81-4144-CV-C (W.D. Mo. Jan. 7, 1982), holding that the legislative history of Section 2c supported the implied repeal of Section 2a(c)(5), which provides that in the event a state loses a representative on account of a decennial reapportionment, the entire state congressional delegation should run at large. A-79 n. 23. That portion of the statute, however, is not at issue in this case. Likewise, the Michigan district court in *Agerstrand* v. *Austin,* No. 81-40256 (E.D. Mich. Feb. 26, 1982), stated that Section 2a(c)(5) was impliedly repealed by Section 2c, but again, that subsection of the statute is not at issue here and involves different considerations.

ever, the district court did not employ Section 2(a)(c)(2) in *Carstens* because a stalemate had been reached (three vetos of three redistricting bills, see A-71-73) and it was therefore proper for the court to intervene and order new districts, there being ample time to do so.

In the instant case, a stalemate has not been reached. The legislative process—in the form of a referendum—is continuing, *see Smiley* v. *Holm, supra,* 285 U.S. 355, 371, and the California Supreme Court owed deference to the legislative process before it intervened and performed the political task of redistricting. *Reynolds* v. *Sims,* 377 U.S. 533, 586 (1964) ("judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so"); *Burns* v. *Richardson,* 384 U.S. 73, 84-85 (1966).

Accordingly, there is a direct conflict between the California Supreme Court and the Colorado three-judge panel on the validity of Section 2a(c)(2).

C. Section 2a(c)(2) Was Not Impliedly Repealed By Section 2c.

1. The Congress Enacted the Predecessor Versions of Sections 2a(c)(2) and 2c Simultaneously, Demonstrating That They Were Intended to Be Complementary.

The California Supreme Court ruled that "the legislative history of section 2c reveals, as does its plain language, that Congress intended 2c to supersede the provisions of section 2a, subdivision (c)." A-23.

However, the predecessor versions of Sections 2a(c) and 2c had actually been enacted simultaneously, demonstrating that the two sections were intended to be read side-by-side and are not in conflict.

The Act of 1911, ch. 5, §§ 3 and 4, 37 Stat. 13, 14 (1911), provided for the apportionment of representatives in Congress under the thirteenth census. Section 3 provided, *inter alia,* that

congressional districts should be equal to the number of representatives to which that state was entitled, no district electing more than one representative. It was therefore similar to Section 2c.

Section 4 of the Act of 1911 was similar to Section 2a(c)(2) and provided that until a state was redistricted, in the event of an increase in the number of representatives under the apportionment, the additional representatives should be elected by the state at large and the others by the districts then prescribed by the law of that state.

Accordingly, the simultaneous enactment of the predecessor versions of Sections 2a(c)(2) and 2c in the Act of 1911 demonstrates that the two sections are complementary and were intended to be so interpreted.

2. The Rules of Statutory Construction Provide That a Statute Will Not Be Construed As Repealing Prior Statutes In the Absence of Express Repeal Unless There is an Irreconcilable Repugnancy Between the Acts.

It is a well-settled rule of statutory construction that a statute will not be construed as repealing prior statutes in the absence of an express repeal, unless there is an irreconcilable repugnancy between the acts. *Mercantile National Bank* v. *Langdeau,* 371 U.S. 555, 565 (1963); *Georgia* v. *Pennsylvania R.Co.,* 324 U.S. 439, 456-57 (1945); *United States* v. *Borden Co.,* 308 U.S. 188, 198-99 (1939) ("There must be a 'positive repugnancy between the provisions of the new law, and those of the old' "); *United States* v. *Greathouse,* 166 U.S. 601, 605, 41 L.Ed. 1130 (1897); *see Boyd* v. *Huntington,* 215 Cal. 473, 482 (1932). Even then " 'the old law is repealed by implication only pro tanto to the extent of the repugnancy.' " *United States* v. *Borden Co., supra,* 308 U.S. 188, 199.[7]

Since the bill enacting Section 2c did not expressly repeal Section 2a(c)(2), it cannot be considered repealed unless there is an irreconcilable repugnancy between the statutes. However, Section 2c is not irreconcilable with Section 2a(c)(2), since Section 2a(c)(2) simply prescribes the proper districts before the state has been redistricted pursuant to Section 2c. The

[7] Hence, whether Section 2a(c)(5) has been impliedly repealed (see footnote 6) has no effect on the validity of Section 2a(c)(2).

simultaneous enactment of the predecessor versions of these statutes demonstrates that they were intended to complement each other.

Further, it is well settled that repeal by implication is disfavored and that there is in fact a presumption against such implicit repeal. *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 168-69 (1976); *Universal Interpretive Shuttle Corp.* v. *Washington Metropolitan Area Transit Comm'n*, 393 U.S. 186, 193 (1968); *United States* v. *Greathouse, supra*, 166 U.S. 601, 605.

Because of the presumption against implied repeal, a court should harmonize and reconcile statutes if that can be done by any fair and reasonable interpretation. *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974); *United States* v. *Greathouse, supra*, 166 U.S. 601, 605; *Frost* v. *Wenie*, 157 U.S. 46, 58, 39 L.Ed. 614 (1895). In the instant circumstances, there is no problem whatsoever in reconciling Section 2a(c)(2) and 2c. In fact, the two sections are complementary, 2a(c)(2) being given effect only "[u]ntil a State is redistricted in the manner provided by the law thereof after any apportionment." Thus, Section 2a(c)(2) wisely recognizes that the legislature may not be able to redistrict the state promptly given the politically sensitive issue redistricting entails.

Another well-settled rule of statutory construction further supports the validity of Section 2a(c)(2). "[A] more specific statute will be given precedence over a more general one, regardless of their temporal sequence." *Busic* v. *United States*, 446 U.S. 398, 406 (1980); *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 168-69 (1976). Section 2a(c)(2) is clearly the more specific provision, solely prescribing the appropriate districts to be used pending redistricting of the state after the decennial census. It should therefore not be held to be superseded by the more general Section 2c.

3. The Legislative History Demonstrates That Section 2c Did Not Impliedly Repeal Section 2a(c)(2).

Section 2c was enacted in 1967 as an amendment to H.R. 2275, a private immigration bill. *See* 113 Cong. Rec. 34032 (1967); 113 Cong. Rec. 31718 (1967).

It is significant that the amendment, introduced by Senator Baker, did not expressly repeal Section 2a(c). H.R. 2275, 90th Cong., lst Session (1967); 113 Cong. Rec. 31718 (1967).

It is even more significant that an earlier bill, considered by Congress that very same year, which also provided for single-member districts and which was thoroughly debated but not enacted, had expressly provided for the repeal of Section 2a(c). *See* H.R. 2508, 90th Cong., 1st Session (Celler-1967).

As a general rule of statutory construction, a court should not interpret a statute to impose "a result that it [Congress] expressly declined to enact" in a previous unsuccessful bill. *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 200 (1974). Yet, the California Supreme Court did just that when it construed Section 2c as repealing Section 2a(c), despite the failure to enact the earlier bill which did provide for the express repeal of Section 2a(c) and the absence of such a provision in the bill which was passed.

Further, the unsuccessful bill, H.R. 2508, had required that the new districting "be established for the regular election . . . next following the year in which each decennial census . . . is taken." In contrast, Section 2c, as enacted, did not provide that the state must redistrict in time for the first election following the decennial census, thereby justifying the need for the interim provisions of Section 2a(c) to prescribe the appropriate districts for elections until the redistricting task had been completed.

In its opinion, the California Supreme Court quoted at length a colloquy between Senator Baker and Senator Bayh (113 Cong. Rec. 31719-20 (1967)) in which the two senators stated that Section 2c required single-member districts whether the reapportionment was done by the state legislature or by a federal court. A-23-24. However, that colloquy is not inconsistent with the validity of Section 2a(c). It merely reflected a legislative intent that when either the state legislature or the court took on the task of redistricting, it had to establish single-member districts under Section 2c. Significantly, that colloquy

did not refer to the districts to be applied *before* the redistricting task had been completed, whether by the legislature or the court, which is precisely the circumstance which Section 2a(c) controls. *See Carstens, supra,* A-79n.23.

Moreover, although it is true that certain representatives during the congressional debates stated their view that Section 2c prohibited a state from running its entire congressional delegation at large (which is not at issue in this case in any event), these statements were made in a context other than that concerning which districts should be applied before the redistricting process had been completed. Essentially, the debates in the Senate and House centered on the question whether New Mexico and Hawaii should be exempted from the one-member district requirement, 113 Cong. Rec. 31719, 34034, 34038, 34364-69 (1967), or whether a court could require a state's entire congressional delegation to run at large after finding a state's districting act unconstitutional. 113 Cong. Rec. 31719, 34037, 34367-68 (1967). Neither issue addressed the question of which districts should be used *before* either a state legislature or court established new districts. In fact, Senator Baker made it clear during the debates that the courts should not intervene and redistrict unless the state legislature had failed in its duty in the first instance to do so,[8] 113 Cong. Rec. 31719 (1967), thereby demonstrating the need for the interim relief provided by Section 2a(c) before the state legislature completed the task.

The California Supreme Court cited the statements in the debates that Section 2c prohibited a state delegation from running at large as evidence that Section 2a(c)(2) had been impliedly repealed. However, like a judicial statement lifted out of the context of the facts, statements in legislative debates taken out of context can be more misleading than meaningful. There was absolutely no discussion, much less a suggestion during the debates that a court would be prohibited from enforcing Section 2a(c)(2) for the period until new districts

[8] It is well established that the state's legal process should be provided a full opportunity to enact a new redistricting plan before judicial intervention. *Reynolds* v. *Sims, supra,* 377 U.S. 533, 585-86.

had been established. Moreover, no objection was made to the failure of the present version of Section 2c to repeal Section 2a(c), although the prior unsuccessful bill debated that year had provided for such repeal.

4. The Use of At-Large Elections Is Constitutional.

There is no constitutional impediment to the at-large election of California's two additional representatives pursuant to Section 2a(c)(2). No one's vote is diluted through an at-large election since each person's vote has equal weight in accordance with the principles announced in *Wesberry* v. *Sanders,* 376 U.S. 1 (1964).

In *Norton* v. *Campbell,* 359 F.2d 608 (10th Cir.), *cert.denied,* 385 U.S. 839 (1966), the Tenth Circuit held that New Mexico's practice of electing two U.S. representatives by state-wide elections was constitutional.

5. Use of The Presently Existing Congressional Districts Pursuant to Section 2a(c) (2), During The Course of the Legislative Process Establishing New Districts, Does Not Violate The Constitutional Requirement of Population Equality.

While not expressly so holding, the California Supreme Court implied that by requiring the use of the existing districts, Section 2a(c)(2) was unconstitutional as applied because the existing districts no longer met the one-person, one-vote requirement embodied in the U.S. Constitution. A-25-26 & n.19.

However, this Court has recognized that population imbalances will occur toward the end of a decennial period but that the Equal Protection Clause does not require "daily, monthly, annual or biennial reapportionment, so long as a state has a reasonably conceived plan for periodic readjustment of legislative representation." *Reynolds* v. *Sims, supra,* 377 U.S. 533, 583-84. This Court ruled that decennial reapportionment is not a constitutional requisite but that if reapportionment were accomplished with less frequency it would be constitutionally suspect. *Id.*

Sections 2c and 2a(c)(2) envision decennial reapportionment; section 2a(c)(2) simply recognizes that the redistricting process may not always be completed in time for the first election after the decennial census and therefore provides for interim relief through the use of existing districts and at-large elections.

Unlike a redistricting statute which enacts districts with population imbalances at its inception, imbalances which are simply caused by the passage of time are not unconstitutional if a "reasonably conceived plan for a periodic readjustment of legislative representation" is initiated every ten years. *See Reynolds* v. *Sims, id.,* 377 U.S. 533, 583-84.

California's decennial readjustment process had been timely commenced and was still continuing at the time the California Supreme Court intervened, rejected the interim relief mandated by Section 2a(c)(2) and imposed the suspended Burton redistricting plan as its own. For the California Supreme Court to impose its own plan when the legislative process for establishing new districts is progressing and has not reached an impasse, is to undermine, if not reject, the judicial doctrine of deference to the legislative process in redistricting matters. *Reynolds* v. *Sims, id.,* 377 U.S. 533, 585-86. Section 2a(c)(2) permits a court to avoid premature and unwarranted judicial intervention by providing an interim measure pending redistricting by the legislative process.

CONCLUSION

The California Supreme Court has held a federal statute invalid, has freed itself from the requirements of that statute and has thereby thrust itself into the legislative redistricting process before it has been completed. Section 2a(c)(2) was intended to provide interim districts until the sensitive political process of redistricting had been completed or had reached an impasse which required judicial intervention. Because the California Supreme Court's invalidation of Section 2a(c) has permitted it to adopt the same gerrymandered districts which

are challenged by the referendum to be held in June, appellants request swift action by this Court to note probable jurisdiction and to set an expedited schedule for the hearing of this appeal.

March 4, 1982

Respectfully submitted,

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Appendix

SUPREME COURT
FILED
JAN 28 1982
Laurence R. Gill,
Clerk

COPY

IN THE

SUPREME COURT OF THE STATE OF CALIFORNIA

ASSEMBLY OF THE STATE OF CALIFORNIA et al.,
Petitioners,

v.

GEORGE DEUKMEJIAN, as Attorney General, etc., et al.,
Respondents;

TIRSO DEL JUNCO, as Chairman, etc., et al.,
Real Parties in Interest.

S.F. 24348

ASSEMBLY OF THE STATE OF CALIFORNIA et al.,
Petitioners,

v.

GEORGE DEUKMEJIAN, as Attorney General, etc., et al.,
Respondents;

TIRSO DEL JUNCO, as Chairman, etc., et al.,
Real Parties in Interest.

S.F. 24349

PHILLIP BURTON, as United States Congressman, et al.,
Petitioners,

v.

MARCH FONG EU, as Secretary of State, etc., et al.,
Respondents;

TIRSO DEL JUNCO, as Chairman, etc., et al.,
Real Parties in Interest.

S.F. 24354

SENATE OF THE STATE OF CALIFORNIA et al.,
Petitioners,

v.

MARCH FONG EU, as Secretary of State, etc., et al.,
Respondent;

TIRSO DEL JUNCO, as Chairman, etc., et al.,
Real Parties in Interest.

S.F. 24356

These consolidated mandate proceedings raise difficult questions concerning referenda challenges to the 1981 Congressional, Senate and Assembly reapportionment statutes passed by a majority of the Legislature and signed by the Governor. (Stats. 1981, chs. 535, 536, 537.)

(1) Are the referendum petitions defective because, in violation of Elections Code section 3516, subdivision (c), they required the signer to use his or her "address as registered to vote" rather than "residence address," thereby making it impossible for election officials to determine if the signers were qualified registered voters?

(2) Even if the petitions contain a substantial defect, should the court allow them to qualify so the referenda may be voted upon by the people of this state?

(3) Even if the petitions would otherwise technically qualify, may the referendum process be used to challenge reapportionment statutes? Does the stay provision of the referendum section of the state Constitution apply to the effective date of the reapportionment statutes?

(4) If the referenda stay the effect of the 1981 reapportionment statutes, how should the 1982 elections be conducted? Should the old, unconstitutional districts be adopted by this court and used in the 1982 elections? Should the court defer to the Legislature and adopt the newly drawn, equally apportioned districts enacted by the Legislature and signed into law by the Governor? If the court has no choice but to mandate the use of the 1981

congressional reapportionment plan, is there a legally compelling reason why the court should not also use the 1981 Assembly and Senate reapportionment plans?

I.

STATEMENT OF FACTS

In September 1981, the Legislature passed three reapportionment statutes revising the boundaries of the state's Congressional, Senate and Assembly districts respectively to conform to the results of the 1980 federal census.[1] These statutes were signed by the Governor and enrolled into law by the Secretary of State on September 16, 1981.

That same day, real parties in interest, the chairman of the California Republican Party and the Republican National Committee, began a petition drive aimed at qualifying for the ballot a referendum on each of these reapportionment statutes. (See Cal. Const., art. II, §§ 9, 10.)[2]

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[1] Article XXI of the California Constitution requires that the Legislature reapportion Assembly, Senate and Congressional districts "[i]n the year following the year in which the national census is taken under the direction of Congress at the beginning of each decade . . . ."

[2] Sections 9 and 10 of article II provide as follows:

"Sec. 9. (a) The referendum is the power of the electors to approve or reject statutes or parts of statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the state.

"(b) A referendum measure may be proposed by presenting to the Secretary of State, within 90 days after the enactment date of the statute, a petition certified to have been signed by electors equal in number to 5 percent of the votes for all candidates for Governor at the last gubernatorial election, asking that the statute or part of it be submitted to the electors.

"(c) The Secretary of State shall then submit the measure at the next general election held at least 31 days after it qualifies or at a special statewide election held prior to that general election. The Governor may call a special statewide election for the measure.

"Sec. 10. (a) An initiative statute or referendum approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise. If a referendum petition is filed against a part of a statute the remainder shall not be delayed from going into effect.

"(b) If provisions of 2 or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail.

(footnote continued on following page)

The Attorney General prepared titles and summaries to appear on the face of the referenda. (See Cal. Const., art. II § 10, subd. (d); Elec. Code, § 3503.)[3] The summaries stated that if signed by the requisite number of electors, the petitions would require the reapportionment statutes to be placed on the ballot for approval or rejection by the voters and would prevent the statutes from taking effect unless approved by a majority vote.

On November 18, 1981, real parties submitted their completed petitions to the Secretary of State. On December 15, the Secretary of State announced that the petitions contained the requisite number of signatures. (See Cal. Const., art. II, § 9, subd. (b) [petitions must contain signatures equalling 5 percent of the votes cast for all candidates for governor at the last gubernatorial election].) However, she also announced that she was refraining from directing the county clerks to place the referenda on the June ballot, pending this court's resolution of these mandate proceedings. (See §§ 3520-3523.) In the interim, she directed the county clerks and registrars to prepare to conduct the primary election under either the old election boundaries or the new districts approved by the Legislature.[4]

The instant mandate proceedings were filed by various members of the Assembly, Senate and House of Representatives and other interested parties. Petitioners attack defects in

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(footnote continued from previous page)

"(c) The Legislature may amend or repeal referendum statutes. It may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval.

"(d) Prior to circulation of an initiative or referendum petition for signatures, a copy shall be submitted to the Attorney General who shall prepare a title and summary of the measure as provided by law.

"(e) The Legislature shall provide the manner in which petitions shall be circulated, presented, and certified, and measures submitted to the electors."

[3] All statutory references are to the Elections Code, unless otherwise noted.

[4] Two statewide elections are scheduled for 1982—a primary election on June 8 and a general election on November 2. All parties agree that the election districts used in the primary must also be used in the general election. If the referendum petitions qualify, the referenda will appear on the ballot in June.

the referendum petitions which, they allege, render the petitions invalid. They also assert that even if the petitions are valid, the referenda do not operate to stay the implementation of the new reapportionment statutes. Petitioners seek writs of mandate compelling state and local officials to omit the referenda from the June ballot and to use the new districts in the 1982 elections. Mandate is an appropriate remedy under these circumstances. (*See Gage* v. *Jordan* (1944) 23 Cal.2d 794, 800 [mandate proper to compel Secretary of State to omit initiative measure from ballot]; *Legislature* v. *Reinecke* (*Reinecke I*) (1972) 6 Cal.3d 595.)

This court issued alternative writs of mandate to resolve the impasse.

II.

CHALLENGES TO THE REFERENDUM PETITIONS

Petitioners contend that the referendum petitions fail to comply with several requirements of the Elections Code and are, therefore, fatally defective. The most serious of these asserted flaws is the failure of the petitions to require a signer to affix his or her residence address, as mandated by section 3516, subdivision (c).[5]

The referendum petitions were circulated by two methods: direct mail and public distribution by hand. Neither version contained a "residence address" instruction. Instead, both versions provided a space for each signer to affix an address,

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[5] Section 3516 provides, in pertinent part: "The petition sections shall be designed so that each signer shall personally affix his or her: ... (c) *Residence address,* giving street and number, or if no street or number exists, adequate designation of residence so that the location may be readily ascertained; ... [¶] Only a person who is a qualified registered voter at the time of signing the petition is entitled to sign it ...." (Emphasis added.)

Section 41 contains similar provisions: "Wherever, by the Constitution or laws of this state, any ... referendum ... petition or paper, ... is required to be signed by voters, only a person who is a registered qualified voter at the time he signs the petition or paper is entitled to sign it. Each signer shall at the time of signing the petition or paper include ... his *place of residence,* giving street and number, and if no street or number exists, then a designation of his place of residence which will enable the location to be readily ascertained ...." (Emphasis added.)

with the words "YOUR ADDRESS AS REGISTERED TO VOTE" printed beneath. In addition, the cover of the direct mail version, which was sent to all Republican voters at their addresses as registered, bore the following directions: "ATTENTION! . . . WHEN SIGNING YOUR PETITION, PLEASE USE THE NAME *AND ADDRESS INFORMATION* EXACTLY AS IT IS LISTED HERE (*EVEN IF INCORRECT*) TO INSURE YOUR PETITIONS QUALIFY . . . ." (Emphasis added.)[6]

Nowhere do the referendum petitions specifically call upon signers to provide the "residence address" information required by section 3516, subdivision (c). The reason for this requirement is quite simple. With minor exceptions, an individual must continue to reside at the address stated in his or her affidavit of registration in order to be qualified to vote. (See generally, Elec. Code, div. 1, ch. 2, §§ 300-320.) It is the duty of the county clerk or registrar of voters to compare a signer's current residence address on the petition with that individual's address as registered to vote in the records of registration maintained by the county clerk. If the addresses match, the requirement of section 3516 that the signer be "a qualified registered voter at the time of signing the petition" has been satisfied. However, without the petition signer's current residence address on the petition, it is *impossible* for the clerk to determine whether the signer was a "qualified registered voter."[7]

In the case of the petitions circulated by real parties, if the signer dutifully followed the instructions on those petitions and provided his or her "address as registered to vote" or "address . . . as it is listed here (even if incorrect)," the address on the petition and the address in the records of registration would automatically be the same. Thus the clerk, whose examination

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[6] At oral argument, counsel for real parties stated that "about half" or "slightly more than half" of the total signatures collected were gathered as a result of this direct mail effort.

[7] As the Secretary of State has informed this court, the elections laws of California have "long required voter registration as a prerequisite to signing initiative and referendum petitions. If it were otherwise, no reliable method could be devised to determine whether the measure had enough popular support to qualify to appear on the ballot."

is limited to a comparison of the petition and the records of registration,[8] can come to no other conclusion than that the signer was properly registered at the time he or she signed the petition. Accordingly, 100 percent of the signatures determined by the clerk to be genuine would also be determined to be those of qualified registered voters. All would be counted as valid signatures for purposes of qualifying the referendum petition for the ballot. (See §§ 3520, 3521.)

Of course, that determination may not be correct. The signer may have moved to a new residence subsequent to registering without having reregistered or executed an address change with the county clerk. (See §§ 305, 315.) In such a situation, the signer would not be a "qualified registered voter at the time of signing the petition." Nevertheless, had he or she complied with the petition instructions regarding address, the clerk would be unable to discern that fact.

Far from being a mere technical shortcoming, real parties' failure to comply with the requirements of section 3516, subdivision (c), goes to the very heart of that section's purpose—to enable the clerk to ensure that petitions have been signed by those entitled to do so—and prevents that purpose from being effectuated.

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[8] Section 3520, subdivision (d), provides that "the clerk or registrar of voters shall determine the number of qualified voters who have signed the petition . . . from the records of registration . . . ."

This limitation, which prohibits the clerk or registrar from examining any extrinsic evidence, has long been recognized by this state's appellate courts. (See *Wheelwright* v. *County of Marin* (1970) 2 Cal.3d 448, 456; *Ley* v. *Dominguez* (1931) 212 Cal. 587, 596; *Schaaf* v. *Beattie* (1968) 265 Cal.App.2d 904, 910; *Ratto* v. *Board of Trustees* (1925) 75 Cal.App. 724, 726.)

The Secretary of State, in a November 16, 1981, advisory memorandum to county clerks and registrars on the subject of "SIGNATURE VERIFICATION ON ELECTIONS PETITIONS," makes reference to this well-settled principle and notes that newly enacted section 45 "codifies existing case law." (Stats. 1981, ch. 589.) That section provides, in pertinent part: "For purposes of verifying signatures on any . . . referendum . . . petition . . . , the clerk shall determine that the residence address on the petition . . . is the same as the residence address on the affidavit of registration . . . . [I]n the case of [a] . . . referendum petition, if the information specified in Section 3516 is not contained in the petition, the affected signature shall not be counted as valid . . . ."

The language of section 3516 is mandatory: "petition sections *shall* be designed so that each signer *shall* personally affix his or her... [r]esidence address...." (Emphasis added.) In the past, when a petition's deficiencies have threatened the proper operation of the election procedures involved, this court has regularly upheld a refusal to file the petition.[9] (See *Muehleisen* v. *Forward* (1935) 4 Cal.2d 17, 20; *Gerth* v. *Dominguez* (1934) 1 Cal.2d 239; *Mayock* v. *Kerr* (1932) 216 Cal. 171.) In *Muehleisen,* the court stated that "[t]he question is not [one] of strict or liberal construction, nor is the case one of immaterial or unsubstantial departure from formal requirements. The... provision is clear and requires no interpretation; and the requirements which were not followed are among the most important elements of the ... system established by the statute." (*Muehleisen, supra,* 4 Cal.2d at p. 20.)

Real parties assert that they have substantially complied with the applicable Elections Code provisions regarding address. However, "[s]ubstantial compliance . . . means *actual* compliance in respect to the substance essential to every reasonable objective of the statute." (*Stasher* v. *Harger-Haldeman* (1962) 58 Cal.2d 23, 29.) The "reasonable objective" of section 3516, subdivision (c), is to enable the clerks to perform their duty to determine whether signers are "qualified registered voter[s] at the time of signing the petition" and thus "entitled to sign it." That objective is totally thwarted when signers are instructed to provide residences that may or may not reflect their current addresses. Under such circumstances, real parties' claim of substantial compliance cannot be sustained.

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[9] Contrary to the Assembly petitioners' assertion, the basis for a clerk's refusal to file petitions that do not meet the requirements of section 3516 is not found in the provisions of section 3511. Section 3511 provides: "Officers required by law to receive or file in their offices any initiative or referendum petition shall not receive or file any initiative or referendum petition which does not conform with the provisions of *this article.*" (Emphasis added.)

Section 3511 does not apply to section 3516, since section 3511 and section 3516 are not in the same article of chapter 1 of division 5 of the Elections Code. Section 3511 is in article 1, which encompasses matters such as title and summary (§ 3502), petition headings (§ 3509), short titles (§ 3510), and full and correct copies of the title and text of proposed measures (§ 3515). Section 3516 is the first section of article 2.

Real parties further contend that should their petitions be deemed deficient, the deficiency nevertheless should be excused as a form of harmless error, based on the fact that the total number of signatures collected was substantially in excess of the number of valid signatures needed to qualify the referenda for the ballot. Such a contention, however, begs the question—how many of the total signatures collected are actually valid? That is a question that cannot be answered because of the failure to request the signers' current residence addresses.

Real parties urge that the standard set forth in section 20024, defining the circumstances under which illegal votes may undo an election, should apply to the cases before this court. That section provides that "[a]n election shall not be set aside on account of illegal votes" unless the number of illegal votes would be sufficient to alter the election results, were they deducted from the total votes of the person whose right to office is being contested. Real parties' attempt to utilize that same test here is unsound. No comparable statutory provision exists for referendum petitions. Moreover, the post-election context is significantly different from a pre-ballot-qualification setting. An election is a completed act, a fait accompli. In contrast, the circulation and qualification of referendum petitions are part of an ongoing process that portends, at most, the potential of an election.

Most importantly, even were a standard analogous to that of section 20024 applicable here, it would not be of assistance to real parties because of the very nature of the defect in their petitions. Without residence address information, the county clerk is unable to identify accurately how many signers are not properly registered. Without an accurate count of such invalid signatures, no determination can be made as to whether or not the requisite number of valid signatures has been obtained.

Finally, real parties seek to excuse their non-compliance with section 3516, subdivision (c) by asserting that they were given incorrect advice by the Secretary of State and the Attorney General. However, the record suggests that real parties may well have been aware of the "residence address" requirements.

Petitioners have directed this court's attention to a document dated July 22, 1981, entitled "BACKSTOP—Operational Plan to Qualify The Referendum On Reapportionment." In addition to the title and date, the cover page also lists the name of Real Party del Junco, in his capacity as Chairman of the California Republican Party. In Addendum C to this document, under the heading "LEGAL REQUIREMENT," section 3516 is quoted in its entirety.

On September 17, 1981, three days *before* Real Party del Junco obtained from the Secretary of State's office the list of registered voters used in the mailings, the Secretary of State sent him a copy of referendum instructions provided to all the county clerks and registrars. Those instructions included a separate paragraph entitled "NOTE TO PROPONENT," specifically directing his attention to sections 3516 and 41, inter alia. Further, in October 1981, while the petitions were circulating, the Secretary of State's office telephoned counsel for del Junco to inform him that the direct mail petition's cover instruction to "please use the . . . address information exactly as it is listed here (even if incorrect)" was "questionable and could cause some problems." (Declaration of Richard B. Maness, staff counsel to the Secretary of State.)

Real parties' asserted reliance on the advice of a deputy attorney general in an informal letter to State Senator Kenneth Maddy is misplaced. The Attorney General is not the official charged with ensuring proper application of the state's elections laws. That is the role of the Secretary of State, California's chief elections officer. (Gov. Code, § 12172.5.) Such vicarious advice does not constitute "official" misinformation. Real parties also purport to rely on a 1980 handbook from the Secretary of State's office to excuse their failure to comply with section 3516, subdivision (c). However, that handbook *correctly* indicates that the signer of an initiative petition should enter his or her "residence address."

These circumstances would not, by themselves, justify sustaining real parties' claim of excuse. However, real parties do raise more troubling justifications for their failure to substantially comply with the provisions of section 3516.

Real parties note that several past, pending, and currently circulating initiative and referendum measures have contained similar instructions regarding "address as registered to vote" or "address as registered."[10] Many of these petitions were subjected to vigorous legal challenge in the courts by competent counsel, and not once was the issue of the "residence address" defect raised by the challengers or addressed by the courts. (*See*, e.g., *Amador Valley Joint Union High Sch. Dist.* v. *State Bd. of Equalization* (1978) 22 Cal.3d 208.)

Further, real parties emphasize that from 1977 until 1980 the Secretary of State's California Ballot Initiative Handbook incorrectly used the phrase "address as registered to vote" in a recommended sample format for initiative petitions. When the error was corrected in a 1980 edition of the handbook, the Secretary of State's office neither publicly announced the correction nor explained its significance. Apparently, neither the Secretary of State nor the county clerks have ever refused to accept a tendered referendum petition on the basis of this defect. Thus, real parties relied on a practice that not only had been accepted by the government entities charged with enforcing the referendum procedures but also had never been subjected to a challenge from any source.

Finally, " 'it has long been our judicial policy to apply a liberal construction to [the] power [of initiative and referendum] wherever it is challenged in order that the right be not

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[10] For example, from 1978 through 1980, the following constitutional and statutory initiative measures appeared on the ballot:

Property Tax Limitations and Exemptions—Initiative Constitutional Amendment (Prop. 13);
Murder—Penalty—Initiative Statute (1978 death penalty initiative);
School Employees—Homosexuality—Initiative Statute;
Limitation of Government Appropriations—Initiative Constitutional Amendment;
Taxation—Initiative Statute (energy business tax);
Rent control—Initiative Constitutional Amendment;
Taxation—Initiative Constitutional Amendment (limitations on personal income tax).

The following are measures which will appear on the ballot in 1982:

Water Facilities—Referendum Statute (Peripheral Canal);
Gift and Inheritance Taxes—Initiative Statute.

improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it. [Citations.]' " (*Associated Home Builders etc., Inc.* v. *City of Livermore* (1976) 18 Cal.App.3d 582, 591, quoting *Mervynne* v. *Acker* (1961) 189 Cal.App.2d 558, 563-564.)

Under the unusual and unique circumstances of this case, real parties' failure to comply with the requirements of section 3516, subdivision (c) will not be deemed to render the referendum petitions invalid. The Secretary of State should proceed to perform her duties, including those set forth in section 3520. All other petitions which either have qualified for the ballot or are in the circulation process as of the date this decision becomes final shall be treated similarly. However, all petitions which have not yet been provided by the Attorney General to the Secretary of State following the preparation of title and summary (§ 3503) will be subject to the express requirements of section 3516, subdivision (c) and their failure to so comply will render them invalid per se.

Petitioners raise three additional challenges to the technical sufficiency of the referendum petitions. First, they claim that the use of preprinted dates on the declarations signed by the petition circulators violated the Elections Code requirement that the declarations contain "[t]he dates between which all signatures were obtained." (See § 3519, subd. (d).) Second, petitioners assert that the text of the reapportionment statutes reprinted in the petitions contained errors, in violation of the requirement that "a full and correct copy of the title and text of the proposed measure[s]" be printed in each section of the petition. (See § 3515.) Finally, they allege that the use of small type size and of interleaved pages in the petitions made them virtually unreadable.

This court has stressed that technical deficiencies in referendum and initiative petitions will not invalidate the petitions if they are in "substantial compliance" with statutory and constitutional requirements. (*California Teachers Assn.* v. *Collins* (1934) 1 Cal.2d 202, 204.) A paramount concern determining whether a petition is valid despite an alleged defect is whether the purpose of the technical requirement is frustrated by the defective form of the petition. "The requirements of both the

Constitution and the statute are intended to and do give information to the electors who are asked to sign . . . the petitions. If that be accomplished in any given case, little more can be asked than that a substantial compliance with the law and the Constitution be had, and that such compliance does no violence to a reasonable construction of the technical requirement of the law." (*Ibid.*) None of the three errors asserted here has interfered with the statutory purpose behind the technical regulations.

First, the petitions contained the phrase, "All signatures to this document were obtained between ____ and ____." The blanks were filled in with printed dates, 9/22/81 and 12/13/81 on the street petitions, and 9/17/81 and 12/15/81 on the direct mail petitions. Petitioners point out that the signatures were apparently obtained in a much shorter time range, between mid-October and mid-November.

Petitioners claim that the preprinted, longer time period impeded the ability of the clerks to determine whether those who signed the petitions were actually registered to vote at the time that they signed. However, the declarations literally complied with the Elections Code requirement that they contain "[t]he dates between which all signatures were obtained." (§ 3519, subd. (d).) The range of dates was sufficient to enable the clerks to make the important determination that all of the signatures were obtained within the proper time limits. Further, although the precise dates might have been useful to the clerks in determining the number of qualified voters who had signed the petitions, no showing has been made that the more general information provided prevented the clerks from carrying out that function. Nevertheless, the objectives of section 3519 will be better served in the future by requiring circulators personally to enter on their declarations the actual dates between which all the signatures on the petition were obtained. Preprinted dates are not a desirable substitute for such personal entries.

Second, the alleged errors in the text of the petitions concern only typographical errors in the listing of census tract numbers. The errors were so minor as to pose no danger of misleading the signers of the petitions. They, therefore, do not affect the validity of the petitions.

Finally, the petitions were fully readable, despite the size of the type. The color-coded referenda packets were sufficiently labeled and differentiated to meet the requirements of the substantial compliance test. Neither of these defects frustrated the signer's ability to understand what he or she was being asked to sign. Accordingly, neither of them renders the petitions invalid.

III.

THE REFERENDUM STAY PROVISION

Next, the court must decide whether the referendum provisions of the state Constitution apply to reapportionment statutes passed by both houses of the Legislature and signed by the Governor. Article II, section 9, subdivision (a) provides: "The referendum is the power of the electors to approve or reject statutes or parts of statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State."

Subdivision (b) sets forth the manner in which a referendum may be proposed. "A referendum measure may be proposed by presenting to the Secretary of State, within 90 days after the enactment date of the statute, a petition certified to have been signed by electors equal in number to 5 percent of the votes for all candidates for Governor at the last gubernatorial election, asking that the statute or part of it be submitted to the electors."

Subdivision (c) sets forth the procedure to be followed by the Secretary of State on receipt of a referendum measure which has been duly qualified. "The Secretary of State shall then submit the measure at the next general election held at least 31 days after it qualifies or at a special statewide election held prior to that general election . . ." if the Governor calls such a special election.

Petitioners do not seriously contend that reapportionment statutes are exempt from the referendum power. In passing, they observe that reapportionment statutes might be deemed

"statutes calling elections" and, therefore, exempted from the referendum process under article II, section 9, subdivision (a). While it is obvious that a reapportionment statute relates to elections, it is equally clear that such statutes do not call elections. (*Boggs* v. *Jordan* (1928) 204 Cal. 207, 220; *Ortiz* v. *Board of Supervisors* (1980) 107 Cal.App.3d 866, 872.)

Petitioners do, however, seriously contend that the filing of a referendum against a reapportionment or any other statute does not stay the effective date of the statute. The focus of the controversy thus centers initially on the interpretation of article II, section 10, subdivision (a) of the Constitution.

Subdivision (a) provides: "An initiative statute or referendum approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise. *If a referendum petition is filed against a part of a statute the remainder shall not be delayed from going into effect.*" (Emphasis added.)

Petitioners acknowledge that the negative implication of the underscored language is that a referendum filed against the entirety of a statute stays that statute pending voter approval. An explicit stay provision was set forth in a predecessor to article II, section 10. Former article IV, section 1, which was repealed in 1966, read in pertinent part, "Upon presentation to the Secretary of State within 90 days after the final adjournment of the Legislature of a [qualified and certified referendum] asking that any act or section or part of any act of the Legislature be submitted to the electors for their approval or rejection, the Secretary of State shall submit to the electors for their approval or rejection, such act [or part thereof] . . . *and no such act* [*or part thereof*] *shall go into effect until and unless approved by a majority of the qualified electors voting thereon*; but if a referendum petition is filed against any section or part of any act the remainder of such act shall not be delayed from going into effect." (Emphasis added.)

Petitioners concede that while this predecessor article was in effect, this court assumed that the filing of a properly qualified referendum asking that a reapportionment statute be

put to a popular vote stayed the effective date of such a statute. (See *Silver* v. *Brown* (1965) 63 Cal.2d 270, 277-278 [dictum]; *Boggs* v. *Jordan, supra*, 204 Cal. 207, 211.)

Petitioners point out, however, that the referendum provisions of article IV of the California Constitution were revised in 1966, and in 1976 were placed in sections 9 and 10 of article II. One result of the 1966 revision was the elimination of the express stay provision of former article IV. Petitioners attach substantive significance to this omission. They argue that the filing of a referendum no longer stays the challenged statute, despite the clear negative implication to the contrary which remains in the current constitutional provision.

Petitioners ask too much of this court. The 1966 revision of article IV was intended "to shorten and simplify the Constitution, deleting unnecessary provisions . . . ." (*Associated Home Builders etc., Inc.* v. *City of Livermore, supra*, 18 Cal.3d 582, 595, fn. 12.) In commenting on the referendum provisions of former article IV, section 1, the Constitution Revision Commission declared that the proposed revision would effect only one substantive change—the effective date of a statute challenged by a referendum but subsequently approved by the voters.[11] "Otherwise," the commission declared, "no change in meaning has been effected" by the proposed revision. (Cal. Const. Revision Com., Proposed Revision (1966) at pp. 46-47.) There remains in the current provision, article II, section 10, subdivision (a), a clear negative implication that a statute challenged in its entirety by a duly qualified referendum is stayed from taking effect until it has been approved by the voters at the required election.

This interpretation is consistent with the nature of a referendum. "The referendum is the power of the electors to approve or reject statutes . . . ." (Cal. Const., art. II, § 9, subd. (a).) As the Secretary of State has pointed out, "In a

[11] Under the former provision, such a statute became effective "five days after the date of the official declaration of the vote by the Secretary of State." As revised by the commission in 1966, the new provision declared that such statute would take effect "5 days after the date of the official declaration of the vote . . . unless the [statute] provides otherwise." (See former art. IV, § 24; compare, art. II, § 10, subd. (a).)

REFERENDUM, VOTERS are asked to APPROVE the BILL which the Legislature has enacted ('YES' VOTE) or to DISAPPROVE ('NO' VOTE) .... The question which is put to the voters is 'SHALL (the bill) BECOME LAW? (YES or NO).'" (Memo. from Sect. of State's office to county clerks and registrars of voters (Sept. 24, 1981).) Approval of the referendum is approval of the bill.

Thus, to declare, as does the first sentence of subdivision (a) of article II, section 10, that a "referendum approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise ..." is to say that the challenged bill takes effect the day after the election. Obviously, there would be no need to define the date on which the challenged law becomes effective if it were already in effect. (Compare, *Walters* v. *Cease* (Alaska 1964) 388 P.2d 263.)

Therefore, under the mandate of article II of the state Constitution, the filing of a valid referendum challenging a statute normally stays the implementation of that statute until after the vote of the electorate. The statute takes effect only if approved by the voters. No express provision in article II excludes reapportionment statutes from the reach of the referendum process or from application of the stay.[12]

IV.

ALTERNATIVES AVAILABLE TO THE COURT FOR 1982 ELECTIONS

There remains the problem as to what districts are to be used for the 1982 primary and general elections. Absent the filing of referenda challenging the 1981 reapportionment statutes, each of those laws would have gone into effect on January

[12] In the alternative, petitioners argue that reapportionment statutes are not "normal" statutes, since they represent the only practicable means by which a citizen's constitutional right to cast an equally weighted vote may be effectuated. Therefore, petitioners contend that the stay effected by the filing of the referenda in this case cannot be construed to prohibit absolutely the implementation of the 1981 reapportionment statutes. This question is addressed in the next section of this opinion, *post*, at pages [A-19-A-22] [typed opn., at pp. 31-35].

1, 1982. (See Cal. Const., art. IV, § 8, subd. (c).) But referenda have been filed, and this court has concluded that they are valid and that their filing stays the date upon which the challenged statutes become law unless and until they are approved by the voters. As a result, the new districts, although presumptively valid, are not now in effect.

The old districting scheme, in effect since its establishment by this court in 1973 (see *Legislature* v. *Reinecke* (*Reinecke IV*) (1973) 10 Cal.3d 396), no longer meets the one-person, one-vote requirement embodied in the equal protection clauses of our state and federal Constitutions. (U.S. Const., 14th Amend.; Cal. Constr., art. I, § 7.) All parties agree that the population changes revealed by the 1980 census demonstrate that the old districts contain population disparities that are clear violations of the state and federal Constitutions' one-person, one-vote mandate.[13] The old districts are, therefore, no longer valid. Moreover, the old congressional district boundaries have been repealed. (Stats. 1981, ch. 535, § 1.)[14]

With no valid districts in effect, the state's election machinery cannot operate. In order for the 1982 elections to proceed, some temporary districting scheme must be established. The impasse now confronting the state must be resolved.

Courts have repeatedly affirmed that reapportionment is a task best performed by the state legislatures. "[T]he institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality . . ." is the Legislature. (*Connor* v. *Finch* (1977) 431 U.S. 407, 414-415.) Since that is not a viable alternative prior to the June primary, this court is forced to assume the "unwelcome obligation" (*id.*, at p. 415) of stepping into the reapportionment fray.

The options available to the court are limited. Were time constraints less pressing, the court might consider requesting the Legislature to develop an interim plan. However, the June

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[13] See discussion of the unconstitutional and impermissible population disparities in the old Assembly, Senate, and Congressional districts, *post*, at footnote 19 and at pages [A-27-A-29] [typed opn. at pp. 44-47].

[14] No referendum was filed against that portion of chapter 535 which repealed the old congressional boundaries.

primary is less than five months away. Respondents Eu, the Secretary of State, and Panish, the Registrar of Voters of Los Angeles County, report that it is too late to use any districts except those in either the out-dated plan or the Legislature's plans. Computer programming requiring two to four months of work has already been performed for both of those plans. There is no time to do similar preliminary programming for any other plan. Further, no new districts could be put into effect in time to inform the electorate and the candidates of their districts before the primary election.[15]

Real parties argue that the 1981 reapportionment measures are not among the options this court may consider. However, decisions of the Supreme Court are to the contrary. Those decisions demonstrate that any practical alternative available to this court may be given consideration, including reapportionment plans which are not yet in effect and which are scheduled to be submitted to the electorate.

The Supreme Court has repeatedly declared that regardless of the requirements of state constitutions, "the delay inherent in following [a] state constitutional prescription for approval of [reapportionment measures] cannot be allowed to result in an impermissible deprivation of [the citizens'] right to an adequate voice in the election of legislators to represent them." (*Roman* v. *Sincock* (1964) 377 U.S. 695, 711; *Reynolds* v. *Sims* (1964) 377 U.S. 533, 584.)

When the delay caused by such state constitutional prescriptions conflicts with a citizen's federal constitutional right to cast an equally weighted vote, a court has the power to set aside the state constitutional provision. "Acting under general equi-

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[15] Such practical considerations also render infeasible any attempt by this court to draft reapportionment plans of its own (see generally *Reinecke I, supra,* 6 Cal.3d at pp. 601-602) and obviate any possibility of giving consideration to alternative plans, such as that drawn up by the Rose Institute and submitted to this court by real parties.

It was suggested at oral argument that the court split the primary election into two parts. The court is reluctant to step in and make such sweeping changes in the electoral process. The consequences of such a proposal are far-reaching and belong more properly before the Legislature. A split primary could have a serious impact on the state treasury, voter turnout, the deadlines for the general election, the timing of other ballot measures, and the lead time for adequate computer programming, to name just a few examples.

table principles," the court must determine whether circumstance require the immediate effectuation of the federal constitutional right. (*Roman* v. *Sincock, supra*, 377 U.S. at pp. 711-712.)

From these principles, it follows that a court, in the exercise of its equitable powers, may not only consider but also adopt reapportionment plans which are not yet final within the framework of a state constitution. This is precisely the action affirmed by the Supreme Court in *Reynolds* v. *Sims, supra*, 377 U.S. 533. In 1962, during the pendency of a federal suit challenging the apportionment of the Alabama Legislature, that body adopted two reapportionment plans. Neither was to take effect until the 1966 election. One of the plans was a proposed constitutional amendment which was scheduled to be submitted to the voters for ratification at the November 1962 general election. The other plan was statutory. It was enacted as a standby measure and was to take effect only if the voters rejected the constitutional amendment, or, should the amendment pass, if a court subsequently declared the amendment unconstitutional. (*Id.*, at pp. 537, 542-544.)

After trial, the district court declared the existing apportionment of the Legislature unconstitutional. (*Id.*, at p. 545.) The court fashioned a temporary remedy comprised of certain aspects of the two proposed plans for use in the 1962 election only. (*Id.*, at p. 552.)

The Supreme Court held that "the District Court acted properly in considering [the] proposed plans, although neither was to become effective until the 1966 election and the proposed constitutional amendment was scheduled to be submitted to the State's voters in November 1962." (*Id.*, at p. 570.) Why? Because "[c]onsideration by the court below of the two proposed plans was clearly necessary . . . in ascertaining what sort of judicial relief, if any, should be afforded . . ." for the 1962 elections.[16] (*Id.*, at p. 571; see also, *Reinecke I, supra*, 6 Cal.3d at p. 602.)

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[16] In his concurrence, Justice Stewart declared that "it was proper for the District Court, in framing a remedy, to adhere as closely as practicable to the apportionments approved by the representatives of the people of Alabama . . . ." (*Id.*, at pp. 588-589.)

Given the breadth of a court's equitable powers in reapportionment cases under federal law, it is clear that this court may give consideration to the Legislature's 1981 reapportionment plans, even though those plans are not yet in effect and are now scheduled to be submitted to a popular vote. In ascertaining the remedy to be applied in a given case, a court may give consideration to any practical alternative which is available.

In addition, a ruling that the stay provision of article II, section 10, subdivision (a) precludes consideration of the Legislature's reapportionment plans would create serious conflicts with other provisions of our state Constitution.

Article XXI, adopted in 1980, requires that the Legislature reapportion the Senate, Assembly, and Congressional districts "[i]n the year following the year in which the national census is taken under the direction of Congress at the beginning of each decade . . . ." It also requires that all members of the Legislature and Congress be elected from single-member districts. (Art. XXI, § 1, subd. (a).) Further, article I, section 7, the state equal protection clause, adopted in 1974, mandates a recognition of the one-person, one-vote principle.

To construe the referendum stay provision so as to prohibit consideration of the 1981 reapportionment plan would frustrate the requirements of both of these newly reaffirmed constitutional provisions. It would substantially delay redistricting of the state, despite the constitutional requirement that reapportionment occur immediately after the federal census. This court would be left with no practical alternative but to impose the old, now seriously malapportioned districts on the state, in violation of the equal protection clause. (See discussion, *ante*, at p. [A-18] [typed opn., at p. 30].) Further, the Legislature's reapportionment plan is the only available option that provides for 45 congressional districts, rather than the 43 formerly allotted to California. If that plan were eliminated from consideration, there would be no way to implement the constitutional requirement that all members of Congress be elected from single-member districts. (See discussion, *post*, at pp. [A-22 A-26] [typed opn., at pp. 36-42].)

Nothing in our state Constitution dictates that the stay provision of article II should have more force and effect than the commands of article XXI or the equal protection clause of article I, section 7. Rather than promoting any particular constitutional provision at the expense of other, equally important provisions, this court must harmonize the various articles of our Constitution so as to minimize any potential conflicts. The conclusion that the referendum stay provision of article II does not remove the 1981 reapportionment statutes from this court's consideration saves that constitutional provision from a potential conflict with the mandates of article XXI and the state equal protection clause.

Petitioners' claim that the referendum provisions of the Constitution do not apply to reapportionment statutes seems unfounded. Similarly without merit is real parties' assertion that the qualification of the referenda prohibits this court from considering the Legislature's plans. The federal Constitution, federal precedent, and our own Constitution all require that the court weigh all the options currently available, including those challenged by the referenda.

V.

CONSTITUTIONAL MANDATES

The impasse facing the state as a result of the qualification of the referenda challenging the Legislature's reapportionment statutes leaves this court no choice but to resolve the pressing problem of what districts should be used in the upcoming primary and general elections. The only alternatives available are either the new plan approved by the Legislature and the Governor or the old districts used in the last decade.

From a practical point of view, which of these plans is available to this court for congressional reapportionment? California is now entitled to 45 representatives instead of 43. Real parties argue that this court should use the 43 old districts and fill the two new seats by statewide elections. Every member of this court agrees that this is *not* a viable alternative.

As this court pointed out in *Reinecke I, supra*, 6 Cal.3d at page 603, federal law forbids the use of statewide elections to fill congressional seats. Section 2c of title 2 of the United States Code provides that, "In each State entitled . . . to more than one Representative under an apportionment made [by the President of the total number of Representatives among the several States], there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established . . . ."

Real parties assert that *Reinecke I* was wrong in holding that section 2c commands the election of congressional representatives from single-member districts. They contend that section 2a, subdivision (c), of title 2 commands at-large elections. The flaw in their argument is that the legislative history of section 2c reveals, as does its plain language, that Congress intended 2c to supersede the provisions of section 2a, subdivision (c).[17]

During the Senate debate on section 2c, proposed by Senator Howard Baker, the following colloquy occurred. After observing that by its terms section 2c would require that each state establish "by law" single-member districts for the election of its representatives, Senator Birch Bayh posed this question to Senator Baker: "*I would interpret 'by law' to mean if the reapportionment is done either by the State legislatures or by the court. I should like to know whether the Senator from Tennessee [Senator Baker] agrees with that interpretation.*" (Debate before the Senate, 113 Cong. Rec. 31719 (1967), emphasis added.)

Senator Baker responded that it was, of course, in the first instance the province of the legislatures to establish congressional districts and that a court should only intervene if the legislature failed to do so. (*Ibid.*)

Senator Bayh, stating that perhaps the Senator had misunderstood his question, went on to observe: "[I]f it is bad government for the legislature to say that Congressmen should

[17] Section 2c of title 2 was enacted in 1967 as an amendment to H.R. 2275, a private immigration bill. (See 81 Stat. 581.)

run at large, then it is bad government for the court to have an entire group of Congressmen running at large in a State." (*Ibid.*)

Senator Baker responded: ". . . I agree . . . ." (*Ibid.*)

Senator Bayh then returned to his original question. "When we say '. . . there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative,' we are talking about either of two situations—whether the legislature reapportions or whether the court reapportions." (*Id.*, at p. 31720.)

Senator Baker replied, "The Senator is correct." (*Ibid.*) During the floor debate, Senator Bayh again asked: "This will make it mandatory for all Congressmen to be elected by single-Member districts, whether the reapportionment is done by State legislatures or by a Federal court." Senator Baker responded: "That is my understanding." Thereafter, section 2c was adopted by the Senate by voice vote. (*Ibid.*)

The bill then went to the House for its consideration. An amendment was proposed to allow those states which had been conducting congressional elections at large (i.e., Hawaii and New Mexico) to do so for the 91st or next congressional election as well. (See Debate before the House, 113 Cong. Rec. 34032 (1967).) Most of the debate focused on the desirability of this proposed amendment. Little was said about the merits of the provision itself. However, one remark is instructive. "The language . . . will prohibit any State from running [its representatives] at large in any future elections." (Remarks of Representative Smith, *id.*, at p. 34035.)

The measure passed the House, as amended, and was returned to the Senate. (See Debate before the Senate, 113 Cong. Rec. 34364 (1967).) There, the debate focused on whether the House amendment allowing Hawaii and New Mexico to elect their representatives at large in 1968 should be accepted. (See *id.*, at pp. 34364-34370.) In the course of that debate, it was observed that, "Beginning with the 1970 elections, and for every congressional election thereafter, every

state of the Union, *with no exception,* must elect its Congressman [sic] from single-member districts." (Remarks of Sen. Fong, *id.,* at p. 34364, emphasis added.) At the close of debate, the Senate passed the bill as amended by the House. (*Id.,* at pp. 34369-34370.)

Given the legislative history of section 2c and this court's observations in *Reinecke I, supra,* 6 Cal.3d at page 603, it is clear that the use of the 43 old districts and an at-large election of the 2 new representatives would contravene the congressional mandate set forth in section 2c. This interpretation is consistent with the decisions of other state and federal courts.[18]

As this court stated in *Reinecke I, supra,* 6 Cal.3d at page 603, the mandate of Congress to elect all representatives from single-member districts is one with which this court fully agrees. "[T]o conduct statewide elections to fill [the new] congressional seats in a state of California's geographical size and large population would not only tremendously increase the burdens and expenses of effective campaigning but, by increasing the choices confronting the electorate . . ., would seriously impede the casting of informed ballots." (*Ibid.*) Further, an at-large election would allow the voters of California to select three representatives instead of the *one* that they are entitled to under law.[19] The only practical and constitutional alternative available for use as a temporary court plan for this election year is the 1981 congressional reapportionment law. (Stats. 1981, ch. 535.)

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[18] There appear to be three pertinent cases: (1) *Whitcomb* v. *Chavis* (1971) 403 U.S. 124, 158, footnote 39 (observing that § 2c reinstated the single-member district requirement in effect prior to § 2a(c)); (2) *Preisler* v. *Secretary of State of Missouri* (*Preisler III*) (W.D. Mo. 1967) 279 F.Supp. 952, 968-969 (observing that when § 2c became law, the court "was relieved of the prior existing Congressional command [under § 2a(c)] to order that the 1968 . . . congressional elections in Missouri be held at large . . ." were the Missouri Legislature to fail to enact a valid reapportionment statute in time), affirmed 394 U.S. 526; and (3) *Simpson* v. *Mahan* (Va. 1971) 185 S.E.2d 47, 48 (holding that the court could not order the state board of elections to certify congressional candidates for election at large).

[19] In addition, the old congressional districts are now seriously malapportioned. According to the figures presented to this court, old Congressional District 43 has a population of 866,687, 64.8 percent above the ideal population size, while old Congressional District 8 has a population of

(footnote continued on following page)

If this court must adopt the 1981 congressional reapportionment plan so that the 1982 House elections can go forward, is there any reason this court should not also adopt the 1981 Assembly and Senate plans? Although few definitive rules guide the choice of an interim election plan, decisions of the United States Supreme Court do provide standards.

The primary federal concern is equal protection—here, the principle of one-person, one-vote. Further, equitable considerations such as the potential disruption of the state's election process must also be considered. (*Reynolds* v. *Sims, supra,* 377 U.S. 533, 585.) Thus, this court must adopt the plan that best ensures equal protection of the law while minimizing any disruptive impact on the election process. In addition, any decision by this court should recognize the basic rule that reapportionment is primarily a legislative task, undertaken by this court only when circumstances permit no alternative. (*Id.,* at p. 586.)

A weighing of the diverse and at times conflicting factors involved in this case leads to the conclusion that the election plans developed by the Legislature in 1981 must be used, as a temporary measure, in the 1982 legislative elections.

The equal protection clauses of both the federal and state Constitutions (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7) mandate that this court adopt the reapportionment plan that most nearly meets the constitutional ideal, absent extraordinary circumstances. (*Cosner* v. *Dalton* (E.D.Va. 1981) 522 F.Supp. 350, 363-364; *Cummings* v. *Meskill* (D.Conn. 1972) 347 F.Supp. 1176, 1177; *Klahr* v. *Williams* (D.Ariz. 1970) 313

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439,310, 16.5 percent below the ideal. The vote of a member of former District 8 would, therefore, be worth almost twice that of a member of former District 43. Six of the old districts contain populations that vary by more than 20 percent from the ideal, 20 vary by 10 to 20 percent from the ideal, and 17 vary by less than 10 percent from the ideal population size.

United States Supreme Court standards for congressional districts are very strict. The court has declared unconstitutional a congressional districting plan containing disparities which ranged to 3.13 percent above and 2.84 percent below numerical equality. (*Kirkpatrick* v. *Preisler* (1969) 394 U.S. 526.)

F.Supp. 148, 153; *Jones* v. *Falcey* (N.J. 1966) 222 A.2d 101, 109-110; see also *Reynolds* v. *Sims, supra,* 377 U.S. at p. 585.)[20]

Given the imminence of the 1982 primary election, only two options are available. This court must choose between the two districting plans currently available, selecting that plan which more nearly comports with the requirements of the federal and state equal protection clauses and is least disruptive of the electoral process.

The old districts contain enormous population variances. The population of the largest old Assembly district is more than 200 percent that of the smallest. The populations of the new districts appear to be within 4 to 7 percent of equality.[21] Clearly, the new districts are far closer to the constitutional goal than the old.[22]

According to figures supplied by real parties, the current population of the old 76th Assembly District (530,643) is 236 percent of the population of the old 16th Assembly District (224,488). The vote of a resident of the former 16th District would, therefore, be worth more than twice that of a resident of the former 76th District. Compared to the current ideal district

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[20] This principle of law has been interpreted to mandate the use of a new reapportionment plan, developed through the legislative process, where it is less unconstitutional than the alternative. (See e.g., *Cosner, supra; Cummings, supra.*) It has also been applied where the constitutionality of a reapportionment plan is undecided, but the disputed plan was constitutionally preferable to the old plan and time was too short to permit development of an alternative. (*Jones* v. *Falcey, supra,* 222 A.2d at p. 109 [although "the litigation ha[d] not run its course," the new plan would be used; the old statute was "far more distant from the constitutional goal" than the statute before the court].)

[21] Petitioners claim that the maximum population deviations are less than 4 percent. Real parties contend that according to the uncorrected district plans one Assembly district deviates by as much as 15 percent, but concede that the corrected districts are probably within 7 percent of absolute equality.

[22] This court passes no judgment on the constitutionality of the new districts. For the purposes of this decision, suffice it to say that the population disparities of the districts are admitted by all parties to be in the range of 4 to 7 percent. This opinion also does not reach the issue of "political gerrymandering" of the election district boundaries. However, it is noted in passing that a federal court has adopted as a temporary measure a redistricting plan with districts that "come closer to [population] equality," despite "the bizarre shapes and irregular boundaries of some of the districts created by the plan. . . ." (*Cummings* v. *Meskill, supra,* 347 F.Supp. at p. 1177.)

size, the old 76th District is 79.4 percent greater than the ideal, while the old 16th District is 24.1 percent less than the ideal. The total deviation between the two districts is 103.5 percent.

Overall, 2 of the old Assembly districts vary by more than 50 percent from the ideal population size of 295,857; 2 vary by 30 to 50 percent from the ideal size; and 48 of the 80 districts vary by 10 to 30 percent from the ideal. Only 28 of the districts are within 10 percent of the ideal district size.

In the Senate, old Senate District 5 now contains 458,587 people, 22.5 percent less than the ideal number, while old Senate District 38 contains 904,725 people, 52.9 percent more than the ideal. Thus, the vote of a resident of former District 5 would be worth almost twice that of a resident of former District 38. The total deviation between the two districts is 75.4 percent. Real parties' figures show that the population of one old Senate district is more than 50 percent greater than the ideal; another is 41 percent greater than the ideal; 19 vary by 10 to 30 percent from the ideal; and 19 are within 10 percent of the ideal population size.

The Supreme Court has not established a rigid numerical limit for legislative districts. However, the high court has developed guidelines for permissible deviations. As summarized by one federal district court, a maximum deviation of less than 10 percent between the largest and smallest districts is permissible and need not be justified by the state. However, a maximum deviation of 10 to 16.4 percent is permissible only if the state can demonstrate that the deviation is the result of a rational state policy. A maximum deviation greater than 16.4 percent is intolerable under the equal protection clause. (*Sims* v. *Amos* (M.D. Ala. 1973) 365 F.Supp. 215, 222, affd. *sub nom. Wallace* v. *Sims* (1974) 415 U.S. 902; *Cosner* v. *Dalton, supra,* 522 F.Supp. at pp. 357-358; see also *White* v. *Regester* (1973) 412 U.S. 755; *Mahan* v. *Howell* (1973) 410 U.S. 315; see 1 Dorsen, Bender & Neuborn, Political and Civil Rights in the United States (4th ed. 1976) pp. 1107-1108.) Under this standard, the old districting plan—with maximum deviations of 103.5 percent (Assembly) and 75.4 percent (Senate)—is a per se violation of the United States Constitution.

As the Supreme Court stated in *Reynolds* v. *Sims, supra,* 377 U.S. at page 585, "once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that *no further elections are conducted under the invalid plan.*" (Emphasis added.) Further, the high court has held that a court-ordered plan, such as that which established California's old districts, must be held to higher standards than a state legislature's plan. (*Chapman* v. *Meier* (1975) 420 U.S. 1, 26.)

California's Constitution provides a further reason to prefer adoption of the Legislature's 1981 reapportionment plans rather than to perpetuate the out-dated, malapportioned districts followed in the past decade. Article XXI of the state Constitution, adopted in 1980, requires the Legislature to reapportion the state in the year following the federal census. This constitutional provision expresses a clear mandate that properly apportioned districts be in effect by the time of the first election following the decennial census.

Use of the Legislature's 1981 plans will also minimize the potential disruption of the electoral and political processes of the state. At the primary, the new reapportionment plans will be either affirmed or rejected. The court cannot and should not attempt to predict the outcome of the referenda. The will of the people, except as already expressed through their chosen representatives, is as yet unspoken. The referenda may be voted up or down. *Both* possibilities must be considered in fashioning a temporary remedy that will do least violence to the orderly conduct of the 1982 elections, regardless of the ultimate result of the referenda.

California faces a unique situation in which the plan by which the elections should be conducted is the subject of a vote at those same elections. Use of the Legislature's 1981 plan for the 1982 elections minimizes any disruption of the electoral process. If the reapportionment statutes are ratified by the voters at the primary, use of them now will cause *no disruption at all.* The 1982 elections will proceed according to the new plan—a statute approved by the Legislature, the Governor, and the people of the state.

Real parties argue that use of the old legislative districts would cause less disruption. That conclusion, however, rests on an implicit and impermissible assumption—that the referenda will result in the rejection of the Legislature's reapportionment statutes. That is an assumption this court cannot legally make. To do so would thrust the court into the political realm, prejudging an issue which is exclusively for the voters of the state to decide.

If the court orders the use of the old districts in 1982 and the reapportionment statutes then are affirmed, the state will be faced with the anomalous situation of an election run under seriously malapportioned, unconstitutional districts, despite the fact that the Legislature, the Governor and the people of the state all have concurred in adopting a new reapportionment statute. The legislators elected in those malapportioned, unconstitutional districts would serve terms of two and four years before the districts chosen by the people and their elected representatives could be given effect.

If the reapportionment statutes are rejected at the primary election, some disruption of the election process will occur no matter which plan is adopted now. The Legislature will be faced with the task of formulating new districts in time for the 1984 elections. That new plan will be subject to possible challenge in the courts and by referendum. At least, however, if the new plans are adopted temporarily in June and November, the 1982 elections will be run under a districting plan that is far closer to federal and state constitutional mandates than the outdated plan of the last decade.

In sum, then, giving equal weight to the possibilities that the referenda may succeed or fail, use of the 1981 reapportionment statutes *minimizes* the potential disruption of the electoral process. It eliminates the danger of the worst possible scenario—use of the old, unconstitutional plans in June and November despite approval of the new plans at the primary election. Further, the use of the 1981 reapportionment plans maximizes the likelihood that there will be no disruption at all.

Adoption of the Legislature's reapportionment plans for temporary use in 1982 also furthers the related goals of judicial restraint and deference to the Legislature. This court passes no

judgment on the wisdom of the Legislature's 1981 plans or on the likelihood that the people will affirm or reject those statutes at the primary election. However, in choosing whether to use an out-of-date plan that no longer conforms to equal protection requirements or a new statute passed by the Legislature, the court cannot be blind to the fact that the Legislature and the Governor have given their assent to the latter plan. Although stayed by the referenda, these statutes were the product of the political give and take of the legislative branch of government, the branch delegated responsibility for reapportionment both by federal precedent and by California's Constitution.[23]

Use of the old plan would also perpetrate a potentially grave injustice on the majority of the people of this state. The effect of reverting to the old plan would be to allow 5 percent of the voters, by signing referendum petitions, to delay implementation of a constitutionally required reapportionment plan for two to four years.[24] Not until 1986 would the voters in some Senate districts electing representatives this year have the opportunity to vote in properly apportioned districts. Although the Constitution of our state grants the power to initiate a referendum to 5 percent of the voters, it does *not* require that the effect of that referendum be articulated in a manner that

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[23]The Supreme Court and the federal district courts have expressed a preference for redistricting plans that resemble the plans adopted by a state legislature. "Just as a federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution, we hold that a district court should similarly honor state policies in the context of congressional reapportionment. In fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.' " (*White* v. *Weiser* (1973) 412 U.S. 783, 795, quoting *Whitcomb* v. *Chavis, supra*, 403 U.S. 124, 160; see also *Reynolds* v. *Sims, supra*, 377 U.S. 533, 588-589 [conc. opn. of Stewart, J.].)

[24]Indeed, language contained in a document entitled, "Operational Plan To Qualify the Referendum on Reapportionment," indicates that the circulators may have intended just such a result. "There are basically two alternatives available to us which could postpone the effective date of reapportionment until after the November 1982 elections. . . ." (See, *ante*, at pp. [A-10-A-11] [typed at pp. 14-15].)

does such serious injury to conflicting and equally compelling constitutional mandates. (See discussion, *ante,* at pp. [A-20 21] [typed opn., at pp. 34-35].)

Any decision by this court requires a balancing of competing constitutional considerations. In light of the strong factors weighing in favor of the use of a revised, up-to-date reapportionment plan, it is simply untenable to argue that the constitutional provision on stays must be followed blindly, no matter what the cost to the equal protection clauses of the state and federal Constitutions and article XXI of the state Constitution.

Maintaining the old election districts for the upcoming election would raise troubling questions about the future of reapportionment in our state. It would create a serious risk that *every* reapportionment plan would be delayed at least two years before it could be implemented. Each decade, the losers in the reapportionment battle could obtain a two-year grace period on the strength of the signatures of 5 percent of the voters, thereby delaying implementation of the new plan until years after the referendum election. Cognizant of the seemingly interminable reapportionment lawsuits of the last two decades, this court should take care to avoid creating a system whereby delay becomes the rule and constitutionally required reapportionment may never be achieved within constitutionally imposed deadlines.

The decision to implement the 1981 reapportionment statutes for the 1982 elections will not circumvent the people's right to vote on those plans at the primary. The outcome of that vote will determine the future of reapportionment for the rest of the decade. This court's decision affects *only* the districts to be used *temporarily* for the 1982 elections. It is an unfortunate but unavoidable consequence of the timing of the referenda that the results of those referenda must necessarily be one step behind the reality of the 1982 elections. For this one year only, the elections must be conducted in ignorance of the preference of a majority of the voters. This is the unhappy result of the unique situation now confronting the state. Further, use of the unconstitutional, out-dated plan would increase the likelihood that the will of the people, as expressed in the primary vote, might be thwarted.

It is important to remember that the Legislature's plans have not been rejected by the voters. The statutes have been placed on the ballot, based on the signatures of 5 percent or more of the actual number of votes cast for all candidates for Governor in the last gubernatorial election. The ultimate disposition of the plans, although put to a vote by the referendum petitions, is as yet undecided. Thus, this case is substantially different from *Reinecke I, supra,* 6 Cal.3d at page 595. There this court held that it would not order use of the results of a "truncated" legislative process absent "the most compelling considerations." (*Id.,* at p. 602) The reapportionment bill in *Reinecke I* had been *vetoed* by the Governor. By way of contrast, the statutes here have never been rejected by any governmental entity. They were *signed* by the Governor and will be put to a vote of the people.

To use the adjective "truncated" to describe both of these situations would seriously stretch the descriptive power and distort the definition of the word. The legislative process in *Reinecke I* was "truncated" by a sharp, final veto by the Governor. The legislative process here has been lengthened but not terminated. A small percentage of the voters has exercised its right to put the question to a vote of the whole. Pending that vote, the legislative process here has been stalled but not derailed, slowed but not "truncated."

The situation facing this court today is distinguishable from *Reinecke I* in another crucial respect: the applicable law has changed in the intervening 10 years. First, the voters of the state amended the state Constitution in 1980 to provide, "In the year following the year in which the national census is taken under the direction of Congress at the beginning of each decade, the Legislature *shall* adjust the boundary lines of the Senatorial, Assembly, Congressional, and Board of Equalization districts . . . ." (Cal. Const., art. XXI, § 1, emphasis added.) This provision replaced former provisions that had been declared unconstitutional on other grounds in 1965. (*Silver* v. *Jordan* (S.D. Cal. 1964) 241 F.Supp. 576, affd. *per curiam, Jordan* v. *Silver* (1965) 381 U.S. 415.) The voters of the state have thus recently reaffirmed their commitment to the

constitutional requirement that the Legislature adopt new apportionment lines immediately after the new census figures are available.

Since *Reinecke I,* this court has also held that our state's equal protection clause (see art. I, § 7), adopted in 1974, has "independent vitality" which at times may require greater protection than that afforded by the federal Constitution (*Serrano* v. *Priest* (1976) 18 Cal.3d 728, 764).

Finally, the years since *Reinecke I* have taught us that the courts cannot tolerate endless delays in the implementation of a constitutional reapportionment plan. *Reinecke* itself required four opinions before this court imposed a court-designed reapportionment plan on the state. (*See Legislature* v. *Reinecke, supra,* 6 Cal.3d 595; *Legislature* v. *Reinecke* (1972) 7 Cal.3d 92; *Legislature* v. *Reinecke* (1973) 9 Cal.3d 166: *Legislature* v. *Reinecke, supra,* 10 Cal.3d 396.) Court battles over reapportionment have frequently stretched far into the decade that the reapportionment plans were intended to serve. The courts must now seek remedies that will encourage prompt resolution of reapportionment disputes.

The calculus confronting this court as it determines the proper remedy for the 1982 elections is thus substantially different from that which faced the court 10 years ago in *Reinecke I.* The new plan carries with it the assent of both the Legislature and the Governor. Although it faces the possibility of rejection by the people, that is as yet only a possibility. On the other hand, the factors militating against use of the old districting plans are far stronger than they were in 1972. The equal protection clauses of both the state and federal Constitutions are less open to delay and stricter in their requirement of one-person, one-vote.[25] Further, an amendment to the California Constitution has specifically reaffirmed the requirement of legislative reapportionment in the year following the federal census.

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[25]Prior to 1962, the United States Supreme Court consistently refused to consider claims that the malapportionment of legislative congressional districts deprived voters of a constitutionally protected right to fair representation. (See, e.g., *Colegrove* v. *Green* (1946) 328 U.S. 549; *MacDougall* v. *Green* (1948) 335 U.S. 281; *South* v. *Peters* (1950) 339 U.S. 276.) The

(footnote continued on following page)

The *Reinecke I* solution—use of the old districts for legislative elections and the new districts for Congressional elections—is not helpful here. The suggestion that it be used today leads ineluctably to a logical conflict. If the court has the power to order use of the new plans for congressional races, a fact agreed to by every member of this court, it must be able to do the same for the state legislative districts. In 1982 the allure of the *Reinecke I* solution lies more in its value as a compromise

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(footnote continued from previous page)

court's decision in *Baker* v. *Carr* (1962) 369 U.S. 186 signaled a dramatic shift in constitutional interpretation, holding that the federal Constitution requires adherence to the one-person, one-vote principle.

Subsequent reapportionment cases of the 1960's involved the at times painstaking initial application of this principle. (See, e.g., *Wesberry* v. *Sanders* (1964) 376 U.S. 1 [congressional districts]; *Reynolds* v. *Sims, supra,* 377 U.S. 533 [both houses of the legislatures].) The decisions of the early 1960's reflected a willingness to delay immediate implementation of this new constitutional mandate in order to give state governments an opportunity to revamp their electoral systems in an orderly manner. (See, e.g., *Reynolds, supra,* at pp. 585-586; *WMCA, Inc.*, v. *Lomenzo* (1964) 377 U.S. 633, 654-655; *Roman* v. *Sincock, supra,* 377 U.S. at pp. 711-712.)

The reapportionment cases of the 1970's refined the standards applicable to redistricting plans, developing more precise guidelines defining the degree of uniformity required by the Constitution. (See, e.g., *Mahan* v. *Howell, supra,* 410 U.S. 315; *Gaffney* v. *Cummings* (1973) 412 U.S. 735; *White* v. *Regester, supra,* 412 U.S. 755; *Sims* v. *Amos, supra,* 365 F. Supp. at p. 222 [standards for legislative reapportionment]; *White* v. *Weiser* (1973) 412 U.S. 783 [congressional district standards].)

In the 1960's and 1970's, the standards applicable to reapportionment changed frequently as the United States Supreme Court articulated the constitutional imperatives with increasing precision. In the 1980's, these standards are no longer in flux. The constitutional requirements are now clearly set forth for the guidance of both legislatures and courts. The uncertainties which required delay in the past two decades have been resolved.

The only published decision cited to this court that considers a legislative attempt to reapportion in light of the 1980 federal census, *Cosner* v. *Dalton, supra,* 522 F.Supp. at pages 363-364, reflects an unwillingness to perpetuate out-dated districts for even one more election. The *Cosner* court simply noted that the use in the 1982 elections of a districting plan based on the 1970 census "would effect great harm to the principle of one-person, one-vote." (*Id.*, at p. 363.) The court opted instead for a recent legislative plan, based on 1980 census data, that came far closer to population equality than the old districts. (*Id.*, at p. 364.)

The decision in *Cosner* is indicative of the rigor with which the constitutional standards must now be applied. In the 1980's there is no longer any justification for delay in the implementation of the one-person, one-vote mandate of our Constitutions.

than its theoretical neatness. And compromise between competing political parties is a political solution, one that is inappropriate for a body whose members are sworn to uphold the constitutional right of the citizens of this state to vote in districts which respect the requirement that each person's vote has equal value.

VI.

CONCLUSION

It is with great reluctance that this court enters a dispute more properly resolved in the political environs of the state Legislature and at the ballot box. However, this court has been given no choice in the matter. The court must act to protect the right of the citizens of this state to vote in an orderly and contitutional fashion. A good faith effort has been made to meet the constitutional imperative of one-person, one-vote, while minimizing any disruption of the electoral or political processes and without intruding into the proper spheres of the coordinate branches of government.

Operating from a neutral judicial stance and postulating no predictions as to the probable outcome of the referenda on the proposed reapportionment plans, the court has ordered a temporary districting plan that best ensures equal protection of the law to the citizens of this state while doing the least violence to the election process this year.

Every member of this court agrees, and most parties concede, that the old, out-dated district plan of 1973 is unconstitutional and may not be used for the congressional elections. The only alternative open to the court is the reapportioned districts adopted by the Legislature and approved by the Governor. If the 1981 congressional reapportionment plan must of necessity be used in the 1982 elections, it is clear that there are no compelling reasons why the 1981 reapportionment statutes governing the Assembly and Senate should be discarded for the old, unconstitutional districts of 1973. This

temporary plan allows the primary and general elections to be held in districts that more nearly comply with the constitutional mandate of one-person, one-vote.

By law, the court must adopt the plan which is most constitutional and least disruptive. If the court were to adopt the old district plan, it would not only do violence to our state and federal Constitutions, but the action might be construed as an impermissible judicial statement about the success of the referenda.

The only way in which the adoption of the unconstitutional, old districts could be justified would be if this court were to pronounce a political conclusion that the reapportionment statutes will be rejected. However, this court is forbidden from making such political assumptions. Instead, this court is constrained to take a neutral look at the results under both the old and new districts should the referenda either pass or fail, in order to determine what alternative is least disruptive. When these different "scenarios" are laid out side by side, it becomes evident that use of the new districts is the less disruptive alternative.

If the old districts were adopted by this court now, but the 1981 reapportionment statutes were affirmed by the voters of this state at the primary, the old, unconstitutional districts would still have to be used in November. This would be the *most* disruptive remedy this court could fashion. The right of the people of this state to equally weighted votes would be denied at both the primary and general elections.

Thus, not only would the will of the people have been thwarted for two years in the case of the Assembly and four years in the case of the Senate, but the November election process would be totally disrupted, since the 1981 reapportionment approved by the Legislature, signed by the Governor, and adopted by the people could not go into effect. Why? Simply because of this court's ukase.

Under *no* circumstances could the use of the old districts be less disruptive than the use of the new districts. If the referenda

fail, a new legislative reapportionment plan will have to be developed, regardless of which districts this court adopts for the 1982 elections.

Justice Richardson's opinion assumes that the "worst possible scenario" is the prospect that the state will have to vote in an additional set of districts if this court adopts the new districts and the referenda fail. However, in labeling this the worst scenario, the dissenting justices overlook the fact that it is only through the use of the new districts that the voters' rights to equal protection and to prompt implementation of the one-person, one-vote mandate will be honored. The *worst* scenario is one in which this crucial right is needlessly violated.

If the new districts are adopted and the referenda pass, there will be *no* disruption whatsoever. The dissenting opinions are understandably silent on this point. The Legislature will have no need to take any further reapportionment action for the remainder of the decade. The will of the people, as expressed in their referenda votes, will be given immediate effect in the November election.

There is an additional problem. If a referendum signed by 5 percent of the voters can stop a legislatively enacted reapportionment plan for a period of two or four years even if it is subsequently adopted by the citizens at a statewide election, then a small minority could thwart the will of a majority of the citizens simply by obtaining a small number of signatures on a petition. Signing a petition would then become not only a request that a reapportionment statute be put to a vote of the people, but a sure-fire method by which to block the implementation of a crucial statute approved by the Assembly, the Senate, the Governor, and the people.

Thus, the adoption of the old districts by this court would have the detrimental effect in the future of encouraging anyone who does not like a legislative reapportionment plan, for whatever reason, to look immediately to the courts to undo it. It cannot be overlooked that if this court were to endorse that view, it would be encouraging a small, dissatisfied minority to force this court to reapportion the state at least once every 10 years. A more disasterous prospect for this court and the

electoral process is difficult to imagine. It is neither wise nor just to place the burden of reapportionment, a basically political responsibility, on the courts of a state.

Certainly, the courts should continue to serve as a forum for resolving legal issues concerning reapportionment. However, the courts should not permit themselves to become a surrogate for the Legislature in this political area, which is properly the province of the legislative and executive branches.

As a court, this body takes *no* position on the political merits of the legislative reapportionment plan or on the outcome of the referenda. Those decisions now rest with the people. This court is concerned with the requirements of the state and federal Constitutions and the impact on the electoral process of a decision by this court. Our goal is to adopt a *temporary* plan that will not be disruptive of the electoral process and does the least amount of violence to the political process.

The only alternative open to the court which meets these criteria is the 1981 reapportionment plan.[26] Even if the referenda result in the rejection of the reapportionment statutes, the election process will undergo no greater disruption than if the out-dated districting plan had been used. However, if the old, unconstitutional plan is adopted, disruption of the election process is assured. Further, constitutional protections of the right to vote and the right to a prompt reapportionment are best served by the adoption of a plan based on the most recent census data.

The referendum power, expressly reserved to the people by the Constitution, is the right to put a statute to a vote by all of the electors. This right must be protected. The outcome of the vote on these referenda may determine the redistricting scheme used for the rest of the decade. Pending the outcome of that vote, this court must follow the mandates of the state and federal Constitutions. Equal protection requires that election

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[26]It is conceded by all sides that there is not sufficient time before the primary to have the court or the Legislature fashion alternative reapportionment plans.

districts conform as nearly as is practically possible to the principle of one-person, one-vote. Article XXI of the state Constitution requires that the state be reapportioned each decade. These provisions impel the conclusion that, as a temporary measure, use of the newly fashioned districts is preferable to the imposition of the seriously and unconstitutionally malapportioned districts of the old plan and, therefore, the only alternative.

The *Reinecke I* solution may seem an alluring compromise. However, it requires this court to make the impermissible political judgment that the referenda will fail and places this court in the shortsighted position of ignoring constitutional mandates and encouraging a pattern of court-ordered reapportionment at least once a decade.

This court has repeatedly noted its reluctance to enter into the complex arena of legislative reapportionment. It should by now be clear to the voters and the elected leaders of this state that under the current method of reapportionment, the constitutional requirement of a legislative reapportionment in the year following the federal census could rarely, if ever, be met. Reapportionment by the courts every decade is not only an inadequate solution, but an intolerable one as well. The Legislature should address this problem and fashion a procedure that will eliminate the delay and wasted resources caused by the current process.

The 1981 reapportionment statutes governing the Congressional, Senate and Assembly Districts are hereby adopted as a temporary reapportionment plan for the 1982 primary and general elections only. Guided by a proper reluctance to enter into an area of public policy reserved for the people and their elected representatives, this court acts today within the most restricted boundaries consistent with its constitutional duties. The old plans are rejected solely because their grossly malapportioned districts are manifestly unconstitutional. The new plans are temporarily adopted solely because they represent the only alternative available to this court that both maximizes adherence to equal protection principles and minimizes disruption to the election process.

This court's decision is strictly judicial in nature. It does not represent, nor should it be used by anyone as, an endorsement or non-endorsement of the views of either the proponents or opponents of the referenda measures. The people are the proper judges of those matters, as to which this court expresses no opinion whatsoever. It is of paramount importance that acts of judicial necessity not be misused as levers of political expediency.

Since its inception, the right of the people to express their collective will through the power of the referendum has been vigilantly protected by the courts. Thus, it has been held that legislative bodies cannot nullify this power by voting to enact a law identical to a recently rejected referendum measure. (*See Gilbert* v. *Ashley* (1949) 93 Cal.App.2d 414, 415-416; *In re Stratham* (1920) 45 Cal. App. 436, 439-440.) Unless the new measure is "essentially different" from the rejected provision and is enacted "not in bad faith, and not with intent to evade the effect of the referendum petition," it is invalid. (*Id., at* p. 440; see also *Reagan* v. *City of Sausalito* (1962) 210 Cal.App.2d 618, 629-631; *Martin* v. *Smith* (1959) 176 Cal.App.2d 115, 118-119.) Should the referenda here be rejected in the primary election, the Legislature will be governed by these rules in fashioning new reapportionment plans for the remainder of this decade.

The Secretary of State informs this court that she has directed the county clerks and registrars of voters not to provide candidates with petitions in lieu of paying filing fees (§ 6494.1) until these consolidated mandate proceedings have been resolved. Pursuant to section 6555, subdivision (b), these petitions otherwise would have been made available as of January 4, 1982. In order to ensure that all candidates who choose to do so may make use of these procedures, the court directs that the last date on which such petitions may be filed be extended by 24 days. To the extent that the deadlines set for filing declarations of intention to become a candidate (§ 25500) and for filing nomination documents (§ 6490) may impinge upon the implementation of this extension, they should be extended administratively in commensurate fashion for the

benefit of those candidates choosing to file in lieu petitions. However, in no event should such extensions be permitted to delay the primary election.

Since there is no reason to believe that the parties to these proceedings will not accede to the holdings of this court, no purpose would be served by issuing writs of mandate. (*Reinecke IV, supra,* 10 Cal.3d at p. 407.)

The alternative writs of mandate heretofore issued are discharged, and the petitions for writs of mandate are denied. Each party shall bear its own costs in the proceedings herein.

The judgment is final forthwith.

BIRD, C. J.

WE CONCUR:

NEWMAN, J.
BROUSSARD, J.
TAMURA, J.*

* Retired Associate Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

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Assembly v. *Deukmejian* et al. S. F. 24348; 24349
Burton v. *Eu* et al. S. F. 24354
Senate v. *Eu* S. F. 24356

CONCURRING AND DISSENTING OPINION BY RICHARDSON, J.

I concur in the majority's conclusion that the referendum petitions are valid and fully qualify for the 1982 primary ballot, that the qualification of the referenda stays the operation of the state Legislature's 1981 reapportionment statutes, and that because of the constraints of federal law and the allocation of two new congressional seats, as a matter of both practical and legal necessity, we should adopt, temporarily, the 1981 legislative enactment of congressional boundaries. I respectfully, but vigorously, dissent, however, from the majority's acceptance of the 1981 legislative enactment of Senate and Assembly district boundaries. In my view, this is most unnecessary, unwise and improper.

Today, and by the thinnest of margins, the majority accepts as its own and in its entirety, a legislative package, the validity of which is under very serious referendum challenge. It does so in the face of a pending election in which the people of this state will, in just over four months, make a final and definitive judgment on the propriety of this very legislation. The majority is not compelled to do so. It acknowledges, as it must, that the qualification of the referenda for the June 1982 ballot has the effect of fully staying the operation of the 1981 legislation. Nonetheless, the majority completely disregards this stay and imposes upon the people of California a state legislative reapportionment plan which has been stopped dead in its tracks by operation of law and which is heavily veiled in a cloud of political uncertainty. The majority's adoption of this plan prejudges the result and its action can only be perceived as an official alignment of the court with one side in a partisan dispute as to which we should remain scrupulously neutral.

Only 10 years ago we *unanimously* agreed, under circumstances wholly analogous to those presented here, that we would retain the existing legislative district boundaries for the 1972 elections despite their noncompliance with federal one person, one vote principles. (*Legislature* v. *Reinecke* (*Reinecke I*) (1972) 6 Cal.3d 595.) *Reinecke I* controls the disposition of the present case, and in my view affords the only satisfactory and practical solution consistent with the people's constitutional right of referendum.

Certain general principles must govern our inquiry. First, the referendum and initiative are very special and favored rights. As we recently observed, "The amendment of the California Constitution in 1911 to provide for the initiative and referendum signifies one of the outstanding achievements of the progressive movement of the early 1900's. Drafted in light of the theory that all power of government ultimately resides in the people, the amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them. Declaring it 'the duty of the courts to jealously guard this right of the people' [citation], the courts have described the initiative and referendum as articulating 'one of the most precious rights of our democratic process' [citation]. '[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it.' [Citations.]" (*Associated Home Builders etc., Inc.* v. *City of Livermore* (1976) 18 Cal.3d 582, 591; accord, *Fair Political Practices Com.* v. *Superior Court* (1979) 25 Cal.3d 33, 41, cert. den. (1980) 444 U.S. 1049.) We are "jealously [to] guard" this "precious" right. As mandated in section 1, article IV, of the state Constitution, "The legislative power of this State is vested in the California Legislature, . . . *but the people reserve to themselves the powers of initiative and referendum.*" (Italics added.)

Second, as the majority is forced to concede, article II, section 10, subdivision (a), of the California Constitution mandates a *stay* of legislation challenged, as here, by a qualified referendum. This subdivision recites "If a referendum

petition is filed against a part of a statute the remainder shall not be delayed from going into effect." By negative implication, if the referendum petition as here is directed to the *entire* statute, the statute is stayed.

Third, again as conceded by the majority, reapportionment statutes are subject to the referendum process. (*Silver* v. *Brown* (1965) 63 Cal.2d 270, 277-278; *Yorty* v. *Anderson* (1963) 60 Cal.2d 312, 316-317; *Boggs* v. *Jordan* (1928) 204 Cal. 207, 211; *Ortiz* v. *Board of Supervisors* (1980) 107 Cal.App.3d 866,872.)

Despite the mandatory nature of the foregoing principles of law, however, the majority refuses to stay *any* of the three challenged reapportionment statutes, for purposes of the 1982 elections, relying instead upon what the majority conceives to be overriding federal principles. As I develop below, while a federal statute may require our temporary adoption of the 1981 *congressional* redistricting statute, neither any statute nor overriding principle justifies the majority's complete disregard of the constitutionally ordained stay or the immediate imposition of the stayed legislation upon *state* legislative districts. In ordering the use of these latter districts for the 1982 elections, the majority at the same time both ignores article II, section 10, subdivision (a), of the Constitution, and deliberately thwarts the will of those hundreds of thousands of California voters whose signatures have already qualified the referendum petitions for election to approve or disapprove the reapportionment statutes. The Constitution requires that there be a stay, but the majority refuses to honor it.

The majority finds it anomalous that a "mere" 5 percent of the voters can effectively postpone the Legislature's reapportionment plan. The answer, of course, is that this was the people's own decision to fix the qualification at 5 percent. In actuality the signatures were in excess of 12 percent and these were speedily obtained. Moreover, this feature of the referendum is no more anomalous than permitting *a single vote* (that of the Governor) to accomplish the same result. (*See Reinecke I*, supra, 6 Cal.3d, at p. 601, wherein we rejected the argument that the Legislature's reapportionment statutes are exempt from the Governor's veto.) The majority's quarrel on

this score is more appropriately directed to the framers of the state Constitution and to the people themselves who, in adopting the provision, authored the dual protections of gubernatorial veto and referendum stay as safeguards against legislative abuses.

The majority argues that a stay coupled with the continued use of voting district boundaries created by us in 1973, would violate federal "one person, one vote" principles incorporated in article XXI of the state Constitution. This conclusion is incorrect for reasons which I now develop with reference to the election, respectively, of members of the Assembly, Senate and House of Representatives.

A. The Assembly

The present boundaries of Assembly districts were drawn by masters appointed by us in 1973 in *Legislature* v. *Reinecke* (*Reinecke IV*) (1973) 10 Cal.3d 396. We adopted as our plan these boundaries following a gubernatorial veto of one plan and the failure of the Legislature to adopt another. The present Assembly districts are based on 1970 census figures and, accordingly, do not accurately reflect recent population trends as disclosed by the 1980 census.

While the majority accepts the contestants' view that the referendum stay cannot properly override "one person, one vote" principles, there is no irreconcilable conflict between those principles and the constitutionally mandated stay.

First, nothing contained in article XXI (adopted in 1980) purports to immunize the Legislature's reapportionment statutes from the usual constitutional checks and balances upon the legislative process, including both the Governor's veto and a referendum challenge accompanied by the immediate stay of the operation of such statutes pending the voters' decision. Article XXI simply requires the Legislature to adopt a plan readjusting voting district boundaries in the year following each national census. Moreover, application of the people's review by the referendum process will not frustrate the purpose of article XXI so long as we retain, as we do, the authority to provide an interim, temporary plan pending that review as discussed below.

Nor are federal one person, one vote principles irreconcilable with the people's right of referendum. As will be seen, the application of these principles need not be instant, immediate and absolute. Rather, of necessity, states are permitted *reasonable* flexibility in adopting and implementing their reapportionment plans, thus permitting *reasonable* delays attributable to referendum challenges. We have so held before under very similar circumstances in *Reinecke I*, supra, wherein we formulated a temporary reapportionment plan for the 1972 elections in which we specifically employed then *existing legislative district boundaries* despite their failure to comply with the constraints of one person, one vote principles. No different result is required in this case.

In *Reinecke I*, the Legislature had adopted a current reapportionment plan, but the Governor had vetoed it, thereby creating the immediate need for *some* plan for the forthcoming elections. We expressly acknowledged that population shifts had occurred and that "the present legislative and congressional apportionments no longer meet the one man, one vote requirement . . . ." (6 Cal.3d, at p. 601) Nonetheless, rather than temporarily use a vetoed, although current plan, or hastily attempt to prepare an entirely new one of our own without public participation, we specifically permitted the preexisting legislative boundaries to remain in effect for purposes of the 1972 elections. Speaking through then Chief Justice Wright, we said: "We believe that it will be *far less destructive of the integrity of the electoral process to allow the existing legislative districts, imperfect as they may be, to survive for an additional two years than for this court to accept, even temporarily, plans that are at best truncated products of the legislative process.* [Citations.]" (P. 602, italics added.) Our reasoning was clear and unmistakable. It should control the result in the case before us. Despite our express acknowledgment of one person, one vote principles, we held that a *temporary* relaxation of those goals as to *legislative* districts would be consistent with preserving the integrity of the electoral process.

It is interesting that real parties have asserted, without contradiction, that the population variances in the present districts are *less* than those which we perpetuated in *Reinecke I*.

It is equally clear that, in terms of the "integrity of the electoral process," a reapportionment plan which is now subject to a referendum challenge qualified for the June 1982 Primary Election, is comparable to one which, although legislatively authored, has failed to receive the Governor's approval. In each instance the plan is inoperable and stayed. Because the ultimate sovereignty rests in the people, no reason appears for elevating analytically the Governor's veto power above the people's reserved referendum authority, given the independent constitutional foundation of each.

Moreover, *Reinecke I* was fully consistent with federal cases which have held that the application of one person, one vote principles may be temporarily postponed while a state is proceeding in a good faith effort toward reapportionment. (See Ely v. *Klahr* (1971) 403 U.S. 108, 114-115; *Lucas* v. *Colorado Gen. Assembly* (1964) 377 U.S. 713, 737; *Reynolds* v. *Sims* (1964) 377 U.S. 533, 583-585; *Skolnick* v. *Illinois State Electoral Board* (N.D.Ill. 1969) 307 F.Supp. 691, 697.) In *Reynolds,* the high court carefully explained that although decennial reapportionment would satisfy equal protection standards, the governing principle is that the states should adopt "a reasonably conceived plan for periodic readjustment of legislative representation. *While we do not intend to indicate that decennial reapportionment is a constitutional requisite,* compliance with such an approach would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative representation." (Pp. 583-584, italics added.) The precise language of the high court which has direct relevancy to the problems before us is as follows: ". . . under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief, in a legislative apportionment case, even though the existing reapportionment scheme was found invalid. In awarding or withholding immediate relief a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles." (P. 585.)

In similar fashion, in the matters before us the pendency of a speedily qualified referendum challenge to a reapportionment plan which will be resolved by the people in just over four months likewise amply justifies temporary use of the existing legislative districts for the forthcoming elections. Here, "an impending election is imminent" and "the state's election machinery is already in progress." Indeed, certain preelection filing deadlines have already been passed, and the Secretary of State and county clerks implore us to act speedily so as not further to disrupt the statutory election machinery. The matters before us are cases to which the foregoing Supreme Court language has precise and unique application.

Those cases which are relied upon by contestants in support of the proposition that one person, one vote principles override the people's referendum right are plainly distinguishable. See, e.g., *Lucas* v. *Colorado Gen. Assembly*, supra, 377 U.S. 713, 734-737; *Silver* v. *Jordan* (S.D.Cal. 1964) 241 F.Supp. 576, 580-583, affd. *sub nom. Jordan* v. *Silver* (1965) 381 U.S. 415, 419-420.) These cases quite properly hold that the people's *approval* (through an initiative or referendum) of a reapportionment plan which is violative of *Baker* v. *Carr*, supra, is constitutionally irrelevant and cannot itself sustain such a plan. Here, an entirely different question is presented, namely, are one person, one vote principles to be so strictly applied as to deny the people themselves their own right to approve or disapprove reapportionment legislation *before* such legislation takes effect? As we have seen on the highest authority, reasonable leeway is permitted in such a case to protect the people's exercise of their precious referendum right. Such a procedure is as soundly established in precedent as it is in principle.

It is urged by the majority that it would be less "disruptive" of, and more "deferential" to, the legislative process were we to purport to acknowledge the validity of the referendum process on the one hand, while at the same time adopting the very 1981 reapportionment statutes which are challenged and stayed as part of a court-ordered temporary plan for the 1982 elections. The referendum process, however, is necessarily a disruptive, undeferential procedure by which the people halt

in their tracks the operation of duly enacted statutes. Nonetheless, the Constitution guarantees that the people's voice shall be both heard and obeyed. It clearly mandates the stay to preserve the effect of the people's will. Any attempt to circumvent such a stay in order to preserve the "orderly" conduct of elections in deference to the Legislature or the Governor, necessarily frustrates and defies the sovereign people. We should be ever mindful that those same democratic values which sustained the high court pronouncement of "one person, one vote" principles in *Baker* v. *Carr,* supra, also form the very foundation for the *constitutionally* authorized referendum and initiative.

Nor should we under the guise of "judicial restraint" adopt the 1981 reapportionment statutes in the face of a qualified referendum challenge which has stayed those very statutes.

In terms of judicial restraint, the choice before us in this case is similar to the choice we confronted in *Reinecke I.* As here, the choice in *Reinecke I* was between old, malapportioned districts and a new reapportionment plan that had been adopted by a majority of the state's elected legislative representatives. In *Reinecke I,* of course, the new districts were not effective because the Governor had vetoed the plan, while here the new districts are not effective because the referendum process has stayed the plan; in both instances, however, the legislative process contemplated by the California Constitution did not result in an effective reapportionment plan.

In *Reinecke I* we did not view the adoption of the "truncated" legislative plan as a choice properly dictated by any considerations of "judicial restraint" even though the plan had been passed by a majority of the state's elected representatives and was closer to one person, one vote principles than the old districts. On the contrary, we emphasized: "Only the most compelling considerations would impel us to disregard the solemn vetoes of the Governor and to adopt the plans passed by the Legislature as court plans, at least in the absence of a complete hearing, . . . which would allow us to exercise a fully informed and independent judgment with respect to those plans. Insofar as reapportionment of the Legislature is concerned, we find no such compelling considerations." (6 Cal.3d,

at p. 602.) Should we now accord less "solemn" weight to the *people's* proscription of the statutes than a Governor's veto? Not under any system in which the people are sovereign.

In reaching our conclusion in *Reinecke I,* we implicitly recognized that our court's automatic adoption of a "truncated" or incomplete legislative proposal would not represent appropriate judicial deference to a product of the state's constitutionally contemplated legislative process which, as of then, was incomplete. Similarly, in the cases before us our adoption of the 1981 plans amounts to judicial intervention into that process, thereby undermining the checks and balances which our state Constitution has consciously built into the legislative scheme to guard against a tyranny of a temporary representative majority. In each instance, these checks and balances on the actions of the Legislature—the gubernatorial veto in *Reinecke I,* the reserved referendum power here—serve the important purpose of moderating the actions of a current majority of lawmakers, helping to ensure that the interests of a broad range of affected individuals are considered in the enactment of legislation. (See generally, The Federalist, No. LXXIII (Hamilton) (1942 ed.) Book II, pp. 72-74.) Moreover, it seems clear that these checks and balances are at least as significant with respect to reapportionment statutes as with respect to other legislation, for in the reapportionment context there is a particularly serious danger that narrow partisan considerations may be given undue weight by a current legislative majority at the expense of the general citizenry's broader interest in competitive districts and electorally responsive representatives. (See *Reinecke IV,* supra, 10 Cal.3d 396, 402-403, 416-417.)

When a court accords automatic "deference" to a legislative plan that has been "checked" by one of the constitutionally designed checks and balances, it inevitably diminishes the salutary tempering effect served by the constitutional safeguard. Thus, for example, if we had automatically adopted the vetoed state legislative reapportionment in *Reinecke I* as an interim plan, we would have lessened the incentive or need of the majority party to take into account the interests of minority party or independent voters so as to secure the signature of the "minority party" Governor. Similarly, when in the present case

we adopt the incomplete legislative plan despite the operation of the referendum stay provision, we inevitably reduce this check on self-serving political action that is provided by the referendum power. On the other hand, if we respect and give effect to the referendum provision, and if the Legislature recognizes that this power may be utilized by the people to prevent a narrowly partisan plan from taking effect, legislators in the future are more likely to attempt to ensure that the fairness of the plan they adopt is generally apparent to the public at large. That is one important purpose of the reserved referendum power.

In sum, contrary to the majority's analysis, we do not exercise proper "judicial restraint" or appropriate "deference to the legislative process" when we ignore the constitutionally mandated stay and adopt the 1981 legislative redistricting plans.

For all of the foregoing reasons, I conclude that the state Assembly boundaries which were adopted by us and based on our masters' plan, rather than the new challenged and stayed ones, should govern the 1982 elections. I emphasize, however, that I would not foreclose the Legislature, if it deems it practical, from adopting in good faith a reapportionment plan substantially different from that adopted in 1981, for purposes of the 1982 and subsequent elections. (See *Reinecke I,* supra, 6 Cal.3d, at pp. 602-604; *Martin* v. *Smith* (1959) 176 Cal.App.2d 115, 118-119.)

B. The Senate

The Senate petition (S.F. 24356) recites that the Senate was elected from 40 districts drawn by us in 1973 in *Reinecke IV,* and that because of population growth and shifts these districts no longer assure compliance with one person, one vote principles.

Although all 40 senatorial districts were redrawn by a statute challenged by the Senate referendum petition (Stats. 1981, ch. 536), a subsequent amendment thereto (ch. 538) purported to redraw further 12 of these districts. This later amendment was not included in the referendum attack. The Senate contestants argue that the referendum cannot preserve

the existing Senate district boundaries, because some of these boundaries are irreconcilable with the 12 new, unchallenged district boundaries.

It is conceded, however that these 12 new districts interlock with the boundaries drawn in challenged chapter 536 and, accordingly, are wholly dependent upon the validity of those remodeled boundaries. If the referendum successfully abrogates chapter 536, then chapter 538 must, of necessity, likewise fail. An examination of the two statutes discloses that chapter 538 readopts almost all of the boundaries previously adopted by chapter 536, making only very minor changes in the 12 districts affected. In fact, chapter 538 evidently was introduced only as a "trailer" or "clean-up" bill designed to correct minor typographical errors in chapter 536 rather than to achieve a substantive revision thereof. Because the alterations made by chapter 538 were minor, and because the boundaries drawn in that chapter were dependent upon the boundaries drawn in the original statute, real parties are correct in assuming that chapter 538 should stand or fall with chapter 536. The referendum process should not be rendered ineffective by the mere reenactment of a challenged plan coupled with inconsequential amendments thereto. The correct test within this context is well established. It is "whether the second legislative enactment is essentially the same as the first," although the legislative body may " 'deal further with the subject matter of the suspended ordinance, by enacting an ordinance *essentially different* from the ordinance protested against . . . .' " (*Martin* v. *Smith*, supra, 176 Cal.App.2d 115, 118-119, italics added; see *Reagan* v. *City of Sausalito* (1962) 210 Cal.App.2d 618, 629-630; *In re Stratham* (1920) 45 Cal.App. 436, 439-440; Annot. 33 A.L.R.2d 1118, 1131-1134; Comment (1949) 49 Colum. L.Rev. 705, 706-707.) *Martin* also requires legislative "good faith" and " 'no intent to evade the effect of the referendum petition. . . .' " (P. 119.) The foregoing principles are sound and should apply in assessing the effect of chapter 538 under the circumstances of this case.

Based upon the same reasons which support the foregoing analysis of the Assembly petitions, I conclude that the newly adopted senatorial boundaries are similarly stayed by the

qualification of the referendum petition which directly challenges them. The masters' boundaries previously adopted by us should be used temporarily for the purposes of conducting the 1982 senatorial elections.

C. The House of Representatives

Although agreeing with the majority's conclusion to use the 1981 legislative plan for congressional districts, I explain the reasons which distinguish congressional from state legislative elections. The House petition (S.F. 24354) alleges that according to the 1980 census, California is entitled to 45 House members, 2 more than those authorized by the 1970 census figures. The 1981 House reapportionment law (Stats. 1981, ch. 535) divides the state into 45 new districts reapportioned in accordance with changes in population reflected by the new census. According to the House contestants, continued use of the forty-three old voting district boundaries would not only violate one person, one vote principles, but also would deprive California of two new House seats. However, a serious challenge is directed both to the underlying fairness of the 1981 congressional boundaries as drawn by the Legislature and to their compliance with article XXI, section 1, subdivisions (c) and (e).

In *Reinecke I, supra,* 6 Cal.3d 595, facing a very similar problem, we adopted a temporary plan for the 1972 elections which retained the preexisting boundaries for the legislative districts but used the new, although vetoed, congressional boundaries. We observed in that case that California was entitled to five new House seats which, in the absence of a valid legislative reapportionment, "will either have to be left unfilled or filled by statewide elections." (6 Cal.3d, at p. 603.) We rejected the latter option, reasoning that "to conduct statewide elections to fill five congressional seats in a state of California's geographical size and large population would not only tremendously increase the burdens and expenses of effective campaigning but, by increasing the choices confronting the electorate from the candidates for one to the candidates for six congressional seats, would seriously impede the casting of informed ballots." (*Ibid.*) We further stressed that although

the Legislature's congressional reapportionment plan had been vetoed by the Governor, it had bipartisan support from all members of the House. (*Ibid.*)

Real parties distinguish *Reinecke I* from the present case on two grounds: (1) Only two, not five, additional House seats are involved, very substantially reducing the burdens, expense and confusion of a statewide election, and (2) the plan involved here enjoys no visible bipartisan support. (I note, however, that both the Republican and Democractic members of the California congressional delegation are united in their opposition to the continued use of old congressional boundaries.)

I believe, however, that aside from the practical considerations disfavoring at large elections of new congressional representatives, and contrary to the case of state legislative elections, federal law expressly forbids at large congressional elections. Thus, in *Reinecke I* we noted that "Congress has expressly provided that California shall elect [its representatives] from . . . single member districts." (6 Cal.3d, at p. 603, fn. omitted.) We relied in this regard on section 2c of title 2 of the United States Code, which provides that "In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment made pursuant to section 2a(b) of this title, there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, *and Representatives shall be elected only from districts so established* . . . ." (Italics added.)

Real parties rely, however, upon 2 United States Code, section 2a(c), which mandates that "*Until a State is redistricted in the manner provided by the law thereof after any apportionment,* the Representatives to which such State is entitled under such reapportionment shall be elected in the following manner: . . . (2) *if there is an increase in the number of Representatives,* [they] *shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of each State*; . . . ." (Italics added.) Real parties urge that this

section supports the temporary use of the former House district boundaries, coupled with statewide election of two additional members serving at large. Under this analysis, section 2a(c), is invoked before a redistricting plan has been adopted, while section 2c applies only after such adoption.

Although the question is close, I am persuaded that section 2c, enacted in 1967, was intended to replace, and has implicitly repealed, section 2a(c). By its very terms section 2c adopted a new procedure governing the 91st and subsequent congressional sessions whereby any additional representatives to which a state became entitled under its reapportionment plan were to be elected *only* from single member districts. In the present case, although the Legislature's own redistricting has been stayed by operation of law, this court, in fashioning our own interim plan for the 1982 elections, must abide by the apparent federal mandate reflected in section 2c.

Considerably less flexibility is permitted in applying one person, one vote principles to congressional voting boundaries. (See *White* v. *Weiser* (1973) 412 U.S. 783, 790-793; *Kirkpatrick* v. *Preisler* (1969) 394 U.S. 526, 531, 533-536.) Although a reasonable delay in implementing an updated plan for state legislative boundaries is expressly allowed by the high court in appropriate cases (*Reynolds* v. *Sims,* supra, 377 U.S. 533, 583-584), it is much less clear that such a delay is permissible in establishing new congressional districts. There is thus a clear distinction between congressional elections, on the one hand, and state legislative districts, on the other.

In *Reinecke I,* we acknowledged that "We regret, of course, that the only readily available congressional reapportionment plan is one that has been vetoed by the Governor." (6 Cal.3d, at p. 603.) In similar fashion, in the present case I regret that the only readily available congressional plan is one which is clouded by a pending, qualified referendum challenge. Yet, under federal supremacy principles, we must abide by the mandate of applicable federal law in controlling federal elections.

D. Conclusion

Thus, I conclude that although the 1981 congressional reapportionment plan must govern the 1982 elections, we should not use the 1981 legislative boundaries for that purpose.

Two more practical consequences make the majority's rejection of our previous *Reinecke I* solution most unwise. The majority seriously errs in assuming (*ante*, p. [A-29] [maj. opn., at p.48] that utilizing the challenged and stayed 1981 reapportionment plans somehow "minimizes the potential disruption of the electoral process." By following our *Reinecke I* precedent, we do not invite "the worst possible scenario" as asserted by the majority. (*Ante*, p. [A-30] [maj. opn., at p. 50].) To the contrary, that dubious distinction belongs to the majority, for it would switch from our old *Reinecke IV* masters' districts to the 1981 legislative plans, and if the people reject those plans in their referenda vote, we would switch to a *third* plan for the 1984 elections. Thus, each voter will have voted, and candidates will have run, in *three* differently constituted districts in the space of four years and one day. *That* is *real* disruption. *That* is the "worst possible scenario."

Moreover, the majority creates an absolutely intolerable anomaly if the voters reject the 1981 redistricting laws. The new districts that will be effective for the remainder of the decade will almost certainly be drawn by a Legislature which has been elected on the basis of a reapportionment scheme which the voters have just rejected. This factor would make it even less likely that the next reapportionment plan will be the result of compromise or that the Legislature will recognize the general electorate's interest in competitive districts and electorally responsive representatives. As a direct consequence, repeated referenda are a near certainty. Moreover, by imposing the stayed 1981 legislatively created boundaries, candidates for both the 1982 Primary and General Elections will then be running in districts, the boundaries of which are nonexistent because they have been rejected by the people. The districts then would draw life only from our fiat issued in defiance of the people's recently expressed will.

Believing that we cannot improve upon it, I would follow the path carefully defined by us in *Reinecke I* and order that, for purposes of the 1982 elections, the existing legislative boundaries and the new congressional boundaries should be used. The majority's ruling, which requires the use of *all three* challenged reapportionment plans for the forthcoming elections, totally defeats the reserved referendum power of the people and the constitutional mandate requiring an *immediate and continuing stay* of the legislation. It also frustrates the self-evident intent of hundreds of thousands of our citizens who in good faith and pursuant to law signed the referendum petitions to permit a review and a public vote upon these plans *before they take effect.* These plans, like those in *Reinecke I,* are merely incomplete products of the legislative process; they will become final and effective only if, as, and when the people have expressed their sovereign will. We should not interrupt that process by a judicial device. The legislative districts should remain exactly as they were until the people have spoken.

RICHARDSON, J.

COPY

Assembly v. *Deukmejian* et al. S.F. 24348; 24349
Burton v. *Eu* et al. S.F. 24354
Senate v. *Eu* S.F. 24356

CONCURRING AND DISSENTING OPINION BY MOSK, J.

I join Justice Richardson's concurring and dissenting opinion. His position is irrefutable. Nevertheless, a bare majority of this court have become entangled in the "political thicket" by ignoring their obligation of neutrality on a partisan issue, a neutrality that can be observed only by maintenance of the status quo in legislative districting until the people speak at the forthcoming election. *Legislature* v. *Reinecke* (1972) 6 Cal.3d 595, written by Chief Justice Wright and concurred in by a unanimous court, charts the course we should follow.

An additional observation on the problem is appropriate. One need not be a cynic to detect the hypocrisy in the political gamesmanship known as reapportionment. Whichever party is in power immediately following the decennial census inevitably undertakes the task with a view to its self-preservation, and the opposition cries foul. The reality is that neither party has a monopoly on virtue. As a result, every 10 years hereafter we may be compelled to endure a gubernatorial veto or a referendum sponsored by the party out of power—perhaps successive referenda after further reapportioning efforts—and to that extent the legislative and political processes of this state will become periodically impotent.

At present the courts can do little to prevent this decennial debacle. Justice Frankfurter clearly saw the issue and the restricted role of the judiciary nearly four decades ago. In *Colegrove* v. *Green* (1946) 328 U.S. 549, 554, he observed that "The one stark fact that emerges from a study of the history of . . . apportionment is its embroilment in politics, in the sense of party contests and party interests." He concluded (at p. 556)

that "*Courts ought not to enter this political thicket.* The remedy for unfairness in districting is to secure State legislatures that will apportion properly . . . . The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights." (Italics added.)

Although it is not the responsibility of the judiciary to solve this essentially political problem, I cannot resist suggesting that a better solution to achieving equitable reapportionment must be found if the people of California are to be served effectively. What that solution should be is beyond my ken. But the wrenching experiences of 1971 and 1981 indicate the people and their representatives should tarry no longer in seeking an answer.

MOSK, J.

COPY

Assembly v. *Deukmejian* (S.F. 24348 and S.F. 24349)
Burton v. *Eu* (S.F. 24354)
Senate v. *Secretary of State* (S.F. 24356)

CONCURRING AND DISSENTING
OPINION BY KAUS, J.

Obviously much is to be said on each side of the only issue that divides the majority and Justice Richardson's dissent which I have signed. The two considerations which, in my view, tip the scale in favor of the dissent are these: First, simple adherence to precedent should make us follow *Reinecke I.*[1] Second, it seems clear to me that the course chosen by the majority involves greater judicial intrusion into the legislative process laid out by the California Constitution. Absent compulsion by *Baker* v. *Carr*—and I see none—we should let that process play itself out without any judicial intervention.

KAUS, J.

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[1]I pity the 1992 Supreme Court which will have to break the tie between *Reinecke I* and *Assembly* v. *Deukmejian*.

ASSEMBLY v. DEUKMEJIAN AND CONSOLIDATED CASES
S.F. 24348, 24349, 24354, and 24356

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RECEIVED
FEB. 16, 1982
Clerk Supreme Court

IN THE

SUPREME COURT OF THE STATE OF CALIFORNIA

PHILLIP BURTON, ANTHONY BEILENSON, GEORGE E. BROWN JR., JOHN BURTON, TONY COELHO, GEORGE E. DANIELSON, RONALD V. DELLUMS, JULIAN DIXON, MERVYN DYMALLY, DON EDWARDS, VIC FAZIO, AUGUSTUS HAWKINS, TOM LANTOS, ROBERT MATSUI, GEORGE MILLER, NORMAN MINETA, LEON PANETTA, JERRY PATTERSON, EDWARD R. ROYBAL, FORTNEY (PETE) STARK, HENRY A. WAXMAN, Individually and as Twenty-one Members of the United States House of Representatives; THELMA TERESA SUSSKIND; and VICTOR MANUEL BOTELLO;

Petitioners;

VS

MARCH FONG EU, Secretary of State of the State of California; and GEORGE DEUKMEJIAN, Attorney General of the State of California;

Respondents;

TIRSO DEL JUNCO, Chairman, CALIFORNIA REPUBLICAN PARTY; REPUBLICAN NATIONAL COMMITTEE;

Real Parties in Interest.

S. F. No. 24354
(Consolidated with Nos. 24348, 24349 and 24356)

NOTICE OF APPEAL

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NOTICE IS HEREBY GIVEN that Real Parties in Interest, Republican National Committee and Tirso del Junco, Chairman, California Republican Party, hereby appeal to the Supreme Court of the United States from that part of the judgment of the Supreme Court of the State of California, entered as final forthwith on January 28, 1982, in Petition for Writ of Mandate No. 24354, (1) holding that 2 U.S.C. § 2a(c) was impliedly repealed by 2 U.S.C. § 2c; and (2) ordering that the 1982 California congressional elections be held in the 45 districts enacted pursuant to Assembly Bill 301, 1981 Stats. Ch. 535 and not in the presently existing 43 districts and two at-large districts, as mandated by 2 U.S.C. § 2a(c).

This appeal is taken pursuant to 28 U.S.C. §1257(1).

Dated: February 11, 1982.

GIBSON, DUNN & CRUTCHER
ROBERT E. COOPER
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By _____
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PROOF OF SERVICE BY MAIL

MARGARET M. KNIGHTON declares as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 2029 Century Park East, Los Angeles, California 90067, in said County and State; on the 12th day of February, 1982, I served the within:

NOTICE OF APPEAL

on the interested parties in this action, by placing a true copy thereof in an envelope addressed to various attorney(s) of record, addressed as follows:

[See Attached Mailing List]

and by then sealing said envelopes and depositing the same, with postage thereon fully prepaid, in the mail at Los Angeles, California; that there is a regular communication between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on this 12th day of February, 1982, at Los Angeles, California.

Margaret M. Knighton
Declarant

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IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

JUDITH F. CARSTENS, KIM M. RUE, W. R. BRAY, J. ROBERT SCHAFER, and SHERILL R. ROCHFORD,

Plaintiffs,

v.

Civil Action No. 81-F-1713

RICHARD D. LAMM, as Governor of the State of Colorado; J. D. McFarlane, as Attorney General of the State of Colorado; and MARY ESTILL BUCHANAN, as Secretary of State of the State of Colorado,

Defendants.

DAVID T. GOENS, JANET ROBERTS, JENNIE SANCHEZ, GEORGE ROSENBERG, and JEAN GALLOWAY,

Plaintiffs,

v.

Civil Action No. 81-F-1870

RICHARD D. LAMM, as Governor of the State of Colorado, and MARY ESTILL BUCHANAN, as Secretary of State of the State of Colorado,

Defendants.

Before MCWILLIAMS, Circuit Judge, FINESILVER and KANE, District Judges

MEMORANDUM OPINION AND ORDER

FINESILVER, District Judge:

In these consolidated cases, the Court is called upon to select a congressional redistricting plan for the State of Colorado. Following the tabulation of the 1980 decennial census, the

Clerk of the United States House of Representatives informed the Governor of Colorado that the state, which currently has five representatives in Congress, was entitled to an additional congressional seat. Although the Governor and the General Assembly (sometimes referred to as the "State Legislature") made repeated attempts to develop an acceptable redistricting plan, both parties were unable to agree on the composition of the new districts. These suits were filed by several concerned citizens of Colorado in an effort to break the existing stalemate through judicial intervention.

After reviewing the testimony and evidence presented at trial, we conclude that the current congressional redistricting plan set forth in C.R.S. 1973 § 2-1-101 is unconstitutional. The Court is of the view, however, that none of the plans submitted to the Court during the course of this litigation fully comport with the objectives and criteria which we feel should be incorporated in a judicially approved redistricting plan. As a result, the Court has fashioned its own plan which satisfies the relevant legal criteria and incorporates the most desirable aspects of the plans presented to the Court.

I.

OVERVIEW OF THE LITIGATION

At the outset, we emphasize that "reapportionment is primarily a matter for legislative consideration and determination and that judicial relief becomes appropriate only when a legislature fails to reapportion to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." *White* v. *Weiser,* 412 U.S. 783, 794-95 (1973) (quoting *Reynolds* v. *Sims,* 377 U.S. 533, 586 (1964)). The State Legislature fulfilled this responsibility ten years ago when the bill creating the current congressional districts was passed by both houses in the General Assembly and signed into law by the Governor. *See* C.R.S. 1973 § 2-1-101. At that time, there

were 2,209,596 people residing within the borders of this state, and the ideal population[1] of each district was 441,919.

Over the past ten years, however, the population of Colorado has grown at a rapid pace. According to the most current 1980 census figures, the population has increased by almost 700,000 people and now stands at 2,889,735.[2] Since this growth rate was proportionally greater than the average overall growth of the nation, Colorado was assigned an additional congressional seat during the decennial reapportionment[3] of the House of Representatives.

Under the provisions of both federal and state law, the primary responsibility for drawing new congressional districts lies with the State Legislature, subject to the approval of the Governor. 2 U.S.C. § 2c (1979)[4]; Colo. Const. art. V, § 44 (1973)[5]. Shortly after the Clerk of the House of Representatives issued the reapportionment mandate, the Governor and

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[1] The "ideal" district population is equal to the total state population divided by the total number of districts. *See* Wollock, ed., *Reapportionment Law and Technology* 6 (1980). [This pamphlet, prepared by the National Council of State Legislatures, in Denver, contains an excellent summary of the issues involved in congressional redistricting.]

[2] Pursuant to an Order of the Panel dated January 7, 1982, the parties stipulated to the population of the State of Colorado based on the most recent revisions in the census data by the United States Census Bureau.

[3] In its technical sense "reapportionment" refers to the redistribution of seats in established units of government, such as the United States House of Representatives. "Redistricting" signifies line-drawing to establish new districts within these units. Congress "apportions" the House of Representatives and the state "districts". *Kilgarlin* v. *Martin*, 252 F. Supp. 404, 10 n.1 (S.D. Tex. 1966) *rev'd in part and remanded sub nom. Kilgarlin* v. *Hill*, 386 U.S. 120 (1967). *See* Bickerstaff, *Reapportionment by State Legislatures: A Guide for the 1980's*, 34 Sw.L.J. 607, 608 (1980).

[4] 2. U.S.C. § 2c (1967) states in pertinent part:

> In each state entitled . . . to more than one Representative under an apportionment made pursuant to section 2a(b) of this title, there shall be established by law a number of districts equal to the number of Representatives to which such state is so entitled . . . .

[5] Colorado Constitution, Article V, § 44 (1974) states:

> The general assembly shall divide the state into as many congressional districts as there are representatives in Congress apportioned to this state by the Congress of the United States for the election of one representative to Congress from each district. When a new apportionment shall be made by Congress, the general assembly shall divide the state into congressional districts accordingly.

As to the role of the Governor in the redistricting process, see Section III, *infra*.

the General Assembly began to consider various methods of approaching the task of redistricting.[6] By July 6, 1981, the first proposed plan, designated "H.B. 1615"[7], had passed both houses of the General Assembly. The Governor promptly vetoed the bill and sent the matter back to the Legislature for further study. His veto message urged the General Assembly to set aside partisan political considerations and develop a "fairer and more responsible plan for congressional redistricting." Exhibit 27a, Governor's Veto Message of H.B. 1615 dated June 12, 1981.

In response to the Governor's veto message, the Executive Committee of the State Legislative Council appointed an Interim Committee on Congressional Redistricting to review new proposals and make recommendations to the General Assembly.[8] After several days of meetings in early July, the Committee referred five plans to the General Assembly. Although the Governor notified the Legislature in advance that none of these plans was acceptable, one plan, designated "H.B. 1618"[9], was subsequently passed by both the State House of Representatives and Senate. The Governor vetoed the bill immediately upon receipt. He criticized the General Assembly for creating a highly partisan plan which would split the home counties of three incumbent Democratic representatives while

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[6] One of the early suggestions was the formation of a citizens' committee with the "responsibility to formulate and recommend to the General Assembly a Congressional District Reapportionment Plan." Exhibit 28, Letter from Governor Richard D. Lamm to Fred E. Anderson and Carl B. "Bev" Bledsoe, dated January 28, 1981. This suggestion was never implemented.

[7] H.B. 1615 is comprised of a "west slope" district which includes most of Boulder County (District 3), a consolidated city and county of Denver (District 1), an "east plains" district (District 4), and a divided Pueblo County (Districts 3 and 5). Its 2nd and 6th Districts include the areas immediately west and east of Denver, respectively, while the 5th District is located in central Colorado.

[8] The Committee was comprised of seven Republicans and four Democrats, the latter appointed by the Republican majority in the Colorado Legislature. *See* Exhibit 25.

[9] H.B. 1618 was the first legislatively passed plan to propose a north-south split in the City and County of Denver (District 1). This plan also split Boulder County and the City of Boulder (Districts 3 and 4), Pueblo and the City of Pueblo (Districts 2 and 5), and created two narrow winding districts in central Colorado (Districts 2 and 5). Like 1615, this plan also recognized to a large extent an incorporated "west slope" and an "east plains" district.

giving "safe" districts to two incumbent Republicans. In addition to the political problems, the Governor noted that the plan "needlessly [split] select counties and fail[ed] to respect important communities of interest." He urged the General Assembly to work together toward an acceptable compromise for the citizens of Colorado. Exhibit 27b, Governor's Veto Message of H.B. 1618 dated July 17, 1981.

The matter was sent back to the Legislature's Interim Committee on Congressional Redistricting which met for several days in August. The Committee reviewed a large number of proposals and ultimately selected three plans for referral to the entire Legislature. Despite warnings from the Governor that he could not approve any of the plans recommended by the Committee, the Legislature reconvened and passed a third plan, designated "H.B. 1624"[10], on September 22, 1981. Rather than veto the bill immediately, the Governor announced his intention to refrain from taking any action on the measure for ten days to allow for the possibility of a compromise.

Before any serious negotiations could begin, however, the first of these consolidated lawsuits, Civil Action No. 81-F-1713, was filed with the Court. The plaintiffs, Judith F. Carstens, Kim M. Rue, W. R. Bray, J. Robert Schafer and Sherill R. Rochford, are residents of each of the five current congressional districts. Their complaint seeks declaratory and injunctive relief against Governor Richard D. Lamm and Secretary of State Mary Estill Buchanan.[11] Specifically, plaintiffs (hereinafter referred to as the "Carstens plaintiffs") make three requests of this Court:

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[10] H.B. 1624 splits Denver into two separate congressional districts in much the same fashion as H.B. 1618. This division is made along an east-west line (starting at Yosemite Street and generally running west along Colfax Ave.) which effectively cuts the city in half. H.B. 1624 also splits Boulder County between a metropolitan District 2 and an agricultural District 4. The city and the county of Pueblo are similarly divided between a west slope District 3 and a central District 5. Additionally, southern Jefferson County and Douglas County are included in the "west slope" district.

[11] Colorado State Attorney General J. D. McFarlane was initially named as defendant in the *Carstens* suit but was dismissed by stipulation of the parties prior to trial.

(1) to rule that C.R.S. 1973 § 2-1-101 is unconstitutional because it provides for only five congressional districts instead of the six districts mandated by the 1980 apportionment of the House of Representatives;

(2) to enjoin defendants from conducting either the primary or general congressional election for 1982 until Colorado is lawfully divided into six congressional districts; and

(3) to accept H.B. 1624, the most recent plan adopted by the Legislature, as the redistricting plan for Colorado in the event that the Governor and the Legislature could not agree on a compromise proposal in a timely manner.

Even the possibility of judicial intervention in the redistricting matter could not prompt the parties to reach an accord. On October 8, 1981, the Governor's ten-day grace period expired and he vetoed H.B. 1624. For the first time, however, the Governor's veto message not only included a critique of the rejected plan but also put forth a counterproposal.[12] Exhibit 27c, Governor's Veto Message of H.B. 1624 dated October 8, 1981. The Governor subsequently met with leaders of the State Legislature to discuss the merits of his plan and the prospects for resolving the matter without judicial assistance.

In the meantime, several concerned citizens filed a second lawsuit on October 23, 1981. The new plaintiffs, David T. Goens, Janet Roberts, Jennie Sanchez, George Rosenberg and Jean Galloway (hereinafter referred to as the "Goens plaintiffs") are also residents of each of the five current congressional districts. Their complaint similarly requests this Court to enjoin the defendants, Governor Richard D. Lamm and Secretary of State Mary Estill Buchanan from conducting the primary or general congressional elections until a new redistricting plan has been adopted. In the absence of a compromise by the

[12] This plan, designated "Governor's Proposal A", more closely resembles Colorado's current congressional scheme than any other. While it contains a "west slope" district (District 3), the east plains are divided in a north-south configuration (Districts 4 and 5). The 5th District extends from the Continental Divide east to the Colorado-Kansas border and south to the Colorado-New Mexico-Oklahoma border. Denver is kept intact (District 1), although Aurora is not.

parties, the Goens plaintiffs asked the Court to adopt a plan which satisfied the following seven requirements: (1) population equality; (2) absence of racial discrimination and non-dilution of minority votes; (3) compactness; (4) contiguity; (5) preservation of county lines; (6) preservation of municipal boundaries; and (7) preservation of communities of interest. The Goens plaintiffs also urged the Court to adopt their proposed plan[13] which complied with the seven stated criteria or, in the alternative, to implement provisions of 2 U.S.C. § 2a(c)(2)(1979). Under this federal statute, the state would elect the "additional Representative . . . from the state at large and the other Representatives from the districts then prescribed by the law of the state." 2 U.S.C. § 2a(c)(2)(1979).

Negotiations between the Governor and the General Assembly continued throughout the month of October and culminated in a settlement conference at the federal courthouse on November 6, 1981. At the end of this conference, both the Governor and the leaders of the General Assembly conceded that there was no hope of reaching a compromise.[14] The two lawsuits were subsequently consolidated, and the case was set for trial on December 3rd and 4th. In the ensuing weeks,

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[13] The plan submitted by the Goens Plaintiffs is comprised of a "west slope" (District 3) and an "east plains" district (District 4), a consolidated City and County of Denver (District 1), a 2nd District of Boulder, Adams County and South Weld County, a 6th district comprised of the suburban municipalities to the west, south and east of Denver, excluding a portion of Aurora, and a 5th district in largely mountainous central Colorado.

[14] The transcript of that conference includes the following colloquy:

THE COURT:	Mr. Halaby [counsel for the Carstens plaintiffs], do you hold out any hope for a resolution or compromise?
MR. HALABY:	Through the legislative process?
THE COURT:	Yes.
MR. HALABY:	I'm afraid I would have to say no.
THE COURT:	[To Ms. Hickman, counsel for the defendant Lamm] Please.
MS. HICKMAN:	No, your Honor, we don't.
	* * *
THE COURT:	Mr. Strahle [Majority Leader in the Colorado House of Representatives]

(footnote continued on following page)

twenty-two plans[15] were submitted to the Court for consideration. At trial, however, testimony focused on five major plans: H.B. 1624,[16] submitted by Carstens plaintiffs; the Goens plan,[17] submitted by the Goens plaintiffs; Governor's Proposal A[18] and the GRC plan,[19] submitted by defendant Lamm; and the McPhee Plan #2,[20] submitted by a private citizen.

(footnote continued from previous page)

* * *

I take it this reflects your feelings and the feelings of the other legislative leadership as expressed by Mr. Halaby; is that correct?

MR. STRAHLE: Unfortunately, yes.

THE COURT: . . . I am satisfied that the legislative leadership, the Governor's office, the Attorney General and the amicus [later to become the Goens plaintiffs] have made every good effort to try to reach an agreement today, and apparently it is not forthcoming.

[15] The Court has reviewed the following plans:

(1) H.B. 1615; (2) H.B. 1618; (3) H.B. 1624; (4) the Lillpop Plan No. 6E; (5) the A-2 Plan; (6) the B-2 Plan; (7) the K Plan; (8) the K Revised 3 Plan; (9) the Callaway Equal Districts Plan; (10) the Yost Plan 1A; (11) the P/S Plan; (12) the Governor's Proposal A; (13) the GCR Plan; (14) the Groff Plan; (15) the Pena-Groff Plan #2; (16) the Goens Plan; (17) the McPhee Plan #1; (18) the McPhee Plan #2; (19) a plan submitted by Waldo Smith; (20) a plan submitted by Richard E. Wanek; and (21) a plan submitted by Herrick S. Roth.

[16] *See* note 10, supra.

[17] *See* note 13, supra.

[18] *See* note 12, supra.

[19] The GCR Plan, an acronym for Messrs. Gilmore, Coddington and Ryan, the experts who prepared the plan for defendant Lamm, is similar to the plan submitted by the Goens plaintiffs. Denver is kept intact (District 1) although Boulder County is split (Districts 2 and 4). The west slope district (District 3) includes Pueblo and a bizarrely split Las Animas County. The 4th District contains most of the eastern agricultural counties and the 5th District is comprised of the central Colorado mountainous region plus El Paso County. District 6 includes all the suburban municipalities to the west, south and east of Denver, with the exception of northern Aurora.

[20] The McPhee Plan No. 2 was devised by Professor William McPhee as a revision of an earlier plan submitted by him. This plan generally includes all of Colorado west of the foothills in a "west slope" district (District 3), incorporates the agricultural east plains in a single district (District 4), and forms the other four districts in a narrow strip along the front range, including a north-south division of Denver similar to H.B. 1624. District 2 includes the city of Boulder and the large municipalities to the west and northeast of Denver, and District 5 includes Colorado Springs and most of Pueblo.

II.

JURISDICTION

The parties agree that this Court has jurisdiction over plaintiffs' claims for declaratory relief pursuant to 28 U.S.C. § 2201 and 2202 (1979). Jurisdiction over plaintiffs' equitable claims is based on 28 U.S.C. §§ 1343(3), 1343(4) (1979) and 42 U.S.C. §§ 1983 and 1988 (1979). Because this case challenges the constitutionality of the current apportionment of Colorado's congressional districts, a three-judge court was convened in accordance with the provisions of 28 U.S.C. § 2248a (1979).[21]

A. Ripeness

Defendant Buchanan contends that the Legislature and the Governor have not had a full opportunity to act on redistricting Colorado, and therefore, the case before the Court is not ripe for adjudication. According to Buchanan, the Legislature and the Governor "may well" reach an accord on redistricting if they are given more time. Plaintiffs, however, point out that Colorado's congressional districts must be finalized prior to certain precinct and primary deadlines.[22] They argue that the Court cannot wait to take action on this matter until those deadlines expire.

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[21] 28 U.S.C. § 2284(a) (1976) states in pertinent part:

> A district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts. . . .

On November 2, 1981, the Honorable Oliver Seth, Chief Judge of the United States Court of Appeals for the Tenth Circuit issued an order appointing Judges Robert H. McWilliams, Sherman G. Finesilver and John L. Kane, Jr. to the panel in the instant case.

[22] These deadlines include: (1) April 1, 1982—The last day for County Commissioners to alter precinct boundaries in conformance with congressional district lines [C.R.S. 1973], § 1-6-101]; (2) May 3, 1982—precinct caucus day [C.R.S. 1973] § 1-3-102(1)]; (3) May 13 to June 2, 1982—First and last day to hold county assembly [C.R.S. 1973, § 1-4-602(1)]; (4) July 1, 1982—Last day for the political party's congressional assembly to designate candidates for Congress [C.R.S. 1973, § 1-4-601]; (5) September 14, 1982—Congressional primary election; and (6) November 2, 1982—General election.

Ripeness is an amorphous legal concept subject to many "subtle pressures including the appropriateness of the issues for decision by this Court and the actual hardship to the litigants of denying them the relief sought." *Poe* v. *Ullman,* 367 U.S. 497, 508 (1961). *See also, Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967); *In re Grand Jury,* 604 F.2d 69 (10th Cir. 1979). The central concern of a ripeness inquiry is "whether there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality" to warrant the attention of the Court. *Lake Carriers Ass'n.* v. *MacMullan,* 406 U.S. 498, 506 (1972) (quoting *Maryland Cas. Co.* v. *Pacific Coal & Oil Co.,* 312 U.S. 270, 273 (1941)). As a general rule, the Court will not review matters involving uncertain and contingent future events that may not occur as anticipated or may not occur at all. *See* Wright & Miller, *13 Federal Practice & Procedure,* § 3532, p. 238 (1975).

In the instant case, the Governor and the State Legislature have had ample opportunity to redistrict Colorado to provide for an additional representative. The Legislature has passed three different redistricting proposals, all of which were subsequently vetoed by Governor Lamm. No attempt was made to override these vetoes. Despite months of deliberate study and negotiations, the people of Colorado still do not have an acceptable congressional redistricting plan.

We are persuaded that the fate of redistricting in Colorado has reached an impasse which the parties are not capable of resolving. At the end of the November 6 negotiating session in the federal courthouse, the parties agreed that it "would do neither side any . . . good to negotiate . . . further". Transcript, Hearing of November 6, 1981, p. 3. Moreover, at trial Representative Ronald Strahle, Majority Leader of the Colorado House of Representatives testified that it was "highly remote" that the Governor and the Legislature would ever agree on an acceptable redistricting plan. This assessment was never challenged.

The hardship to the parties and to the people of Colorado is evident. There is no dispute that the current posture of Colorado's congressional districts is unconstitutional. If an acceptable redistricting plan is not adopted, the only alternative would be to hold the 1982 congressional elections pursuant to

district lines which are patently offensive to the long-established principle of "one person-one vote". Thus, this Court is presented with a controversy of immediate concern. There is no indication that absent judicial intervention, a viable solution will be forthcoming. Considering the nature of the issues presented for decision and the hardship to the parties, we find that the redistricting question is ripe for adjudication.

B. Applicability of 2 U.S.C. § 2a(c)(2)

One possible short term solution to the redistricting dilemma is contained in 2 U.S.C. § 2a(c)(2) (1979). This federal statute declares, "until a state is redistricted in the manner provided by the law thereof after any apportionment, . . . if there is an increase in the number of representatives, such additional representative or representatives shall be elected from the state at large and the other representatives from the districts then prescribed by the law of such State." Defendant Buchanan maintains that even if this matter is ripe for review, this Court must defer to the directives of this statute and dismiss the case.

The Carstens plaintiffs claim that this Court is not constrained by the provisions of 2 U.S.C. § 2a(c)(2) because the measure was impliedly repealed when Congress passed 2 U.S.C. § 2c in 1967. Section 2c provides, "In each state entitled. . .to more than one representative under an apportionment, . . .there shall be established by law a number of districts equal to the number of representatives to which such state is entitled, and Representatives shall be elected only from districts so established, no district to elect more than one representative. . ." On its face, Section 2c appears to prohibit at-large elections under any circumstances since the number of districts and the number of representatives must always be equal.

We are of the view that these two statutes are not necessarily inconsistent and do not preclude this Court from considering the redistricting dilemma. Section 2c prohibits a legislature or court from deliberately designing a redistricting plan which would elect at-large representatives. Arguably, Congress did not repeal Section 2a(c)(2) because they did not want to leave a state without a remedy in the event that no

constitutional redistricting plan exists on the eve of a congressional election, and there is not enough time for either the Legislature or the courts to develop an acceptable plan.[23] In

[23] *But see Shayer, et al. v. Kirkpatrick et al.*, No. 81-4144-CV-C (W.D. Mo. Jan. 7, 1982). In *Shayer*, a three-judge court considered the applicability of 28 U.S.C. § 2a(c)(5) in a suit challenging the consitutionality of Missouri's existing congressional districts. Section 2a(c) (5) provides:

> (c) Until a State is redistricted in the manner provided by the law thereof after any reapportionment, the Representatives to which such state is entitled under such apportionment shall be elected in the following manner:
>
> * * * *
>
> (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives they shall be elected from the State at large.

The Missouri court concluded that § 2a(c)(5) was not applicable inasmuch as it was inconsistent with the § 2c prohibition of at-large elections and, thus, repealed by implication. The Court relied in part on the following colloquy between Senator Howard Baker of Tennessee and Senator Birch Bayh of Indiana during the floor debate on § 2c:

> Mr. Baker: [2 U.S.C. § 2c] strictly provides in a straightforward manner that when there is more than one member of the House of Representatives from a state, the state must be districted, and the members may not run at large.
>
> * * * *
>
> Mr. Bayh: Suppose a state legislature does not do it [redistrict]. Does the Senator not think that, to be consistent, we should say that the Federal Court should not be permitted to reapportion a state and let all the legislators run at large?
>
> Mr. Baker: With respectful deference to my colleague, I think not; because I believe that you are then running afoul of the very problem that is created by occasional failure of state legislatures to adhere to the provisions of Article I of the Constitution.
>
> * * * *
>
> Mr. Bayh: . . . I just wish to make one brief comment in summary, in light of the colloquy.
>
> This will make it mandatory for all Congressmen to be elected by single-member districts, whether the reapportionment is done by the state legislatures or by a Federal Court.
>
> Mr. Baker: That is my understanding.

Shayer, supra, slip opinion at pp. 7-8. We do not feel that these comments, or any of the congressional debate on § 2c necessarily indicate a desire on the part of Congress to repeal § 2a(c)(2). A persuasive argument can be made that the statute is a stop-gap measure to be utilized in the limited circumstances discussed above.

this very limited circumstance, we believe that Section 2a(c)(2) provides emergency statutory relief from an otherwise unconstitutional situation. There is nothing in the language of Section 2a(c)(2) which indicates that Congress intended to bar the federal courts from providing timely assistance to the state in resolving a redistricting dispute. Since the posture of this case does not require the use of such a drastic emergency remedy, we find that Section 2a(c)(2) is not applicable here.

Motion to Dismiss or Affirm

Supreme Court, U.S.
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No. 81-1641
IN THE

Supreme Court of the United States

October Term, 1981

REPUBLICAN NATIONAL COMMITTEE, TIRSO DEL JUNCO, CHAIRMAN, CALIFORNIA REPUBLICAN PARTY,
Appellants,

vs.

PHILLIP BURTON, *et al.*,
Appellees.

On Appeal From the Supreme Court of California

MOTION TO DISMISS OR AFFIRM

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Appellants,

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PHILLIP BURTON, *et al.*,

Appellees.

MOTION TO DISMISS OR AFFIRM

The Appellees in the above-entitled case move the Court to dismiss the appeal herein or, in the alternative, to affirm the unanimous judgment of the Supreme Court of the State of California on the ground that the federal question presented by the appeal is so narrow and insubstantial that it fails to merit the exercise of this Court's plenary jurisdiction.

I.
SUMMARY OF ARGUMENT.

The basic facts of this case are adequately set forth in the opinion of the Supreme Court of the State of California* and do not require reiteration here. Nonetheless, it merits emphasis at the outset that the litigation below, an exercise of the original jurisdiction of the Supreme Court of Cali-

**Assembly v. Deukmejian*, 30 Cal.3d 638 (1982).

fornia, involved essentially a problem of state law. The main question presented with respect to congressional reapportionment was whether a referendum against the Legislature's reapportionment plan had, pursuant to the California Constitution, suspended the legal effect of that plan until it could be put to a popular vote at the June primary and, if so, what congressional reapportionment plan should be used for the 1982 congressional elections. The court decided to order implementation of the Legislature's congressional plan in order to comply both with the state constitutional requirement that the state have equally apportioned single-member districts in effect for the June primary, and with the requirements of federal constitutional and statutory law. The plan chosen by the state court plainly conforms with all requirements of the United States Constitution and appellants do not challenge the court's decision on any constitutional basis.

The appellants claim that their appeal presents an important federal question that is likely to recur and that there presently exists a conflict in the courts concerning that question. A closer examination of the precise question presented by the appeal, however, belies those claims. In fact, the narrow question raised by this appeal is insubstantial and involves no present or foreseeable conflict between the courts. The appeal consequently fails to present a federal question worthy of an exercise of this Court's plenary jurisdiction.

Broadly, of course, this appeal has to do with the permissibility under federal law of at-large congressional elections. Appellants dispute the conclusion of the Supreme Court of California that 2 U.S.C. Section 2a(c) and its authorization of at-large congressional elections was repealed by the subsequent passage of Section 2c. But because of the many state law grounds supporting the judgment

appealed in this case, and because of this Court's rule against review of state court judgments supported by adequate and independent state grounds, the appellants have had to designate a far more narrow question than the correctness of the lower court's conclusion that Section 2a(c) has been repealed.* The narrowness and insubstantiality of the question that appellants actually proffer may be seen by noting what appellants do *not* argue.

Appellants do not argue that the Supreme Court of California erred in failing to *consider* the use of the at-large remedy contained in Section 2a(c) as one of several possible emergency measures that federal law permits in exigent circumstances. They also do not argue the general proposition that at-large elections are a *desirable* stop-gap measure that merit prudential consideration when, on the eve of a congressional election, the state lacks constitutionally apportioned single-member districts. Either argument for *permissive* use of the Section 2a(c) remedy would be foreclosed by the independent and adequate state grounds relied on by the Supreme Court of California in its decision not to perpetuate the state's old and grossly malapportioned congressional districts. Instead, appellants argue that the California Court was *compelled* by Section 2a(c) to ignore the results of the 1980 census and to allow elections in 43 malapportioned districts based on the 1970 census, supplemented by two state-wide elections at large, notwithstanding the availability of properly apportioned single-member districts.

Appellants' narrow argument necessarily ascribes a peculiar intent to Congress. Section 2a(c), by its own terms,

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See Section II.A., *infra*. Though it is unnecessary to the conclusion that this appeal does not merit plenary consideration, appellees note and analyze their full concurrence with the conclusion of the court below Section II.E., *infra*.

would operate only "[u]ntil a state is redistricted *in the manner provided by the law thereof* . . . ." (emphasis added). The Supreme Court of California found that state law, as well as federal law, required it to redistrict the state to insure that it had 45 single-member, equally populous congressional districts in effect for the June, 1982 congressional primary. In order to avoid the apparently necessary conclusion that the Supreme Court of California performed a redistricting in the manner provided by California law and that Section 2a(c) would consequently not operate in this case, appellants must argue either that California's highest court erred in its view of the manner in which California law provides for redistricting or that Congress somehow intended to prohibit state courts from acting in accordance with state law to avoid the very at-large elections Congress banned generally in 2 U.S.C. Section 2c. Since the former argument is one which this Court will not entertain, appellants are left with the task of rationalizing the quixotic intent they ascribe to Congress. Appellees respectfully submit that an evaluation of this explication does not merit plenary review.*

An equally serious defect in appellants' agreement is the fact that their interpretation of Section 2a(c) would compel a violation of Article I, Section 2 of the United States Constitution. Article I, Section 2 requires that a state create congressional districts with as equal populations as practicable after the decennial census and forbids a state from perpetuating malapportioned districts after the decennial census when it is feasible to provide properly apportioned districts. The old congressional districts that the Supreme Court of California refused to perpetuate were gravely

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**See* Section II.B., *infra*.

malapportioned and were flagrantly unconstitutional for use in 1982.*

A further impediment to the success of this appeal is the fact that, apart from its constitutional infirmities and inherent implausibility, the appellants' argument must overcome the very language of the statute on which it relies, which would appear to preclude its application in this case. Section 2a(c) would require, *inter alia*, use of "the districts then prescribed by the law of such state . . ." when the state lacks a new redistricting plan before the first election of a decade. But in this case, the Supreme Court of California found as a matter of state law that the old congressional districts had been effectively and finally repealed by the state legislature. Thus, those districts were a legal nullity under California law and could in no way be termed the districts "then prescribed" by California law. The role appellants claim for Section 2a(c) is consequently irrelevant to the judgment of the California court.**

All of the foregoing reasons for denying plenary review of the judgment below are fully independent of the question whether Congress intended unequivocally to ban at-large congressional elections for all time by passing Section 2c and impliedly repealing Section 2a(c). While the conclusion is unnecessary to a determination of the substantiality of the federal question presented in this appeal, appellees emphatically concur with the Supreme Court of California and the other courts which have concluded that Congress intended precisely such a ban, and that no court may permit such elections. There is no indication whatsoever in the legislative history of Section 2c that Congress' rejection of at-large elections contained any exception to accommodate

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*Appellants' contrary argument is discussed in Section II.C., *infra*.

***See* Section II.D., *infra*.

tardy state reapportionments. Even if Congress did intend to countenance at-large elections for dire emergencies, there is certainly no support for appellants' radical argument that Congress intended ever to *compel* such elections and to forbid state courts from preventing the use of such elections by performing a redistricting in accordance with the mandates of state law.* Even appellants' case-in-chief, with which they claim the judgment here challenged conflicts, summarily rejected that proposition.**

There is no reason for this Court to grant plenary review of this appeal. It presents a remarkably narrow and unfortunately frivolous claim and involves no relevant conflict in the lower courts. Accordingly, appellees respectfully move the Court to dismiss the appeal or to affirm the judgment below without any further briefing or oral argument.

II.

THIS APPEAL PRESENTS NO SUBSTANTIAL FEDERAL QUESTION AND SHOULD THEREFORE BE DISMISSED.

In their attempt to invoke this Court's jurisdiction, appellants have embraced the radical proposition that 2 U.S.C. §2a(c)(2) required the Supreme Court of California to order the conduct of the state's 45 congressional elections in 43 districts based on the population figures of the 1970 census, supplemented by two at-large elections, despite the ready availability of 45 properly apportioned single-member districts passed by the State Legislature. The proposition is without legal merit, and the appeal upon which it is

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**See* Sections II.B., II.E., *infra*. Moreover, as explained in Section II.C., *infra*, Congress would also have had to intend to prevent state courts from complying with the mandate of Article I, Section 2 of the United States Constitution, which requires decennial reapportionment of congressional districts.

***Carstens v. Lamm*, No. 81-F-1713 (D. Colo. Jan 28, 1982). *See* Section III, *infra*.

grounded is frivolous. In such circumstances, the appeal should be denied for want of a substantial federal question. *Zucht v. King*, 260 U.S. 174, 176 (1922); *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 311 (1902).

A. Appellants Are Constrained to Present Only a Narrow and Insubstantial Federal Claim in Order to Avoid the Adequate and Independent State Grounds Which Would Support the Judgment They Appeal.

This Court has consistently adhered to the self-imposed principle that it will not review a state court judgment based on an adequate and independent state ground, even though a federal question is involved and is arguably wrongly decided. *E.g., Fox Film Corp. v. Muller*, 296 U.S. 207 (1935); *Berea College v. Kentucky*, 211 U.S. 45, 53 (1908); *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 636 (1875).

In the opinion below, the Supreme Court of California explicitly based its judgment on both federal and state grounds. It concluded that the United States Constitution and 2 U.S.C. §2c required it to place 45 equally populous single-member districts in effect in time for the June 1982 congressional primary. *Assembly v. Deukmejian*, 30 Cal.3d 638, 657-60, 662-64, 665, 672-73 (1982). But the Court also held that, quite apart from federal directives, state law mandated that the court prepare an equally apportioned, single-member congressional district plan. This conclusion was supported by reference to three state constitutional provisions. First, the court held that the old districts were grossly malapportioned and in violation of the equal protection clause of the state constitution.* *Id.* at 660-61, 665, 676-77. Second, the Court held that Article XXI of the state constitution "requires that all members of . . . Congress

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*California Const. Art. I, §§11, 21.

be elected from single-member districts." *Id.* at 660. Finally, the court held that Article XXI "expresses a clear mandate that properly apportioned districts be in effect by the time of the first election following the decennial census." *Id.* at 667-68.

These three state law holdings would immediately foreclose review in this Court if appellants had claimed simply that the Supreme Court of California erred in concluding that it was precluded by federal law from ordering the use of the 43 old congressional districts, supplemented by two at-large elections. That assertedly erroneous conclusion would have had no effect on the judgment in the case, since the California court would still have been precluded by *state* law from permitting either at-large elections or elections in districts based on the previous decade's census data.

Accordingly, appellants do not argue that the court below erred only in its conclusion that federal law prohibited at-large elections. Instead, they argue that federal law *mandated* at-large elections and the use of the old congressional districts and *forbade* the Supreme Court of California from fashioning new single-member districts in order to comply with the California Constitution. Thus, this appeal does not present the broader question whether federal law *permits* at-large elections in special, emergency circumstances not here present. Instead, it presents only the narrow, insubstantial and frivolous question whether federal law *compels* such elections in the circumstances presented below.

B. Section 2a(c) by Its Very Language Would Not Forbid the Supreme Court of California From Redistricting in Accordance With State Law Mandates.

The language of Section 2a(c) contains the explicit limitation that the section would be effective only "[u]ntil a state is redistricted in the manner provided by the law

thereof . . . ." 2 U.S.C. §2a(c)(2). In the absence of a state redistricting plan providing for a constitutional, single-member set of congressional districts, then, Section 2a(c) would* provide a "stop-gap" mechanism for election of the additional congressional representatives to which a state might be entitled after the decennial reapportionment. If, however, the state has been redistricted in accordance with federal and state law, then Section 2a(c) would clearly not apply.

The Supreme Court of California concluded that state law required it to redistrict the state in time for the 1982 elections. Accordingly, it chose to implement the only redistricting plan available to it that conformed with state law mandates and adopted the plan passed by the state legislature but stayed from going into automatic effect by the pendency of a state referendum. *Assembly v. Deukmejian*, 30 Cal.3d 638, 677 (1982). Appellants argue that it was error for the court to do so, and base their argument on a supposed mandate of Section 2a(c). But the language of 2a(c) makes it clear that that section would be effective only *until* the state has been redistricted in accordance with state law. Appellants do not explain why the redistricting performed by the Supreme Court of California pursuant to the mandate of state law does not properly constitute a redistricting "in the manner provided by the law" of California or why Section 2a(c) would not consequently be inapplicable to the judgment below. Though appellants argued below that state law forbade the Supreme Court of California from adopting the redistricting plan it did, their arguments are of no consequence in this Court. Appellants must argue, then, that

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*In this section, as in Sections II.C. and II.D., *infra*, appellees assume for the purposes of argument that Section 2a(c) has not been superseded by 2 U.S.C. Section 2c. Section II.E. demonstrates, however, that Section 2a(c) has in fact been replaced by Section 2c.

it is some feature of federal law that prohibited the California court from intervening to prevent the 1982 congressional elections from being conducted in 43 malapportioned districts supplemented by two at-large elections.

Whatever may have been the intent of Congress when it passed Section 2c in 1967, it cannot have been to accord Section 2a(c) the function of forbidding state courts to act to avoid at-large congressional elections, especially when state law itself required single-member districts. As is more fully explicated in Section II.E., *infra*, the Congress that enacted Section 2c did so with a considerable demonstration of hostility to the at-large elections it proscribed in Section 2c. The bill's supporters observed that the effect of Section 2c was to insure that "[b]eginning with the 1970 elections, and for *every* congressional election thereafter, every state of the union, *with no exception*, must elect its congressman [sic] from single-member districts." Remarks of Senator Fong, 113 Cong. Rec. 34364 (1967) (emphasis added).

It is inconceivable that this same Congress intended to forbid a state court from acting in accordance with its own state law to prevent the very at-large congressional elections that were the object of such congressional disapproval. The language "in the manner prescribed by the law thereof" cannot plausibly be read to limit the effect of state law in preventing at-large congressional elections. Nowhere in the legislative history is there any discussion of circumstances in which at-large congressional elections after 1970 would be permitted, let alone compelled, despite a contrary mandate of state law.*

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*In *Doulin et al. v. White et al.*, Civ. No. LR-C-81-418 (E.D. Ark. February 22, 1982), the court did not decide whether section 2c repealed Section 2a(c) by implication. It remarked: "We need not decide this question, because even if at-large elections are legally permissible, *everyone would agree that they are not required. . . .*" (emphasis added).

Appellants' argument that Section 2a(c) forbade the Supreme Court of California to reapportion in accordance with state law is frivolous and may be summarily rejected by this Court.

C. The Argument on Which This Appeal Is Grounded Would Have Compelled a Violation of Article I, Section 2 of the United States Constitution.

Appellants argue that Section 2a(c) mandated that the Supreme Court of California impose upon the State 43 grossly malapportioned congressional districts and two at-large congressional elections, despite the ready availability of 45 properly apportioned single-member congressional districts based on the latest national census. Acceptance of this proposition entails the conclusion that a federal statute, Section 2a(c), would have compelled the Supreme Court of California to violate the United States Constitution. Such a proposition is plainly unacceptable.

The Supreme Court of California found that the old congressional districts for which appellants argued below "are now seriously malapportioned." *Assembly v. Deukmejian*, 30 Cal.3d 638, 664 n. 19 (1982). Based on 1980 census data, the total deviation of the old districts is 81.3%. *Assembly v. Deukmejian, supra*, 30 Cal.3d at 664 (1982). This Court has struck down as unconstitutional congressional districts with total deviations as low as 4.13%. *White v. Weiser*, 412 U.S. 783 (1973). *See*, also *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969) (5.97% deviation rejected); *Wells v. Rockefeller*, 394 U.S. 542 (1969) (13.096% deviation rejected). The conclusion is inescapable that the old districts fail utterly to pass constitutional muster,* and that

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*In its conclusion, the Supreme Court of California stated that "[e]very member of this Court agrees and most parties concede, that the old, out-dated District Plan of 1973 is unconstitutional and may not be used for the congressional elections." *Assembly v. Deukmejian, supra*, 30 Cal.3d at 674.

the imposition of those districts by the California Court would have posed grave federal constitutional problems.

The circumstances presented to the Supreme Court of California were *not* emergency circumstances in which there was no alternative to perpetuating malapportioned congressional districts after the federal decennial census. In such exigent circumstances, it might be permissible for a court to perpetuate concededly unconstitutional districts. *See, e.g., Roman v. Sincock*, 377 U.S. 695, 709-10 (1964); *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). But as this Court wrote in *Reynolds v. Sims, supra*, 377 U.S. at 585, "it would be the unusual case in which a Court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan."

Appellants argue that decennial congressional reapportionment is *not* a constitutional requirement, and that federal law provides a "grace period" to permit the processes of state redistricting law to run their course. The only authority cited for this proposition is *Reynolds v. Sims, supra*, in which this Court indicated that a state law procedure that provided for *state legislative* apportionment less frequently than decennially 'would assuredly be constitutionally suspect" under the Equal Protection Clause.* *Reynolds v. Sims, supra*, 388 U.S. at 583-84.** A case that states that less frequent than decennial reapportionment is assuredly constitutionally suspect is at best weak authority for the "grace period" theory appellants put forth.

Moreover, the *Reynolds* rule, whatever it might countenance, is a plainly inappropriate standard for timely congres-

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*U.S. Const. amend. XIV, §1.

**Significantly, there appears to be no reported federal decision in which a state procedure has been upheld that provides for less frequent reapportionment of its state legislature.

sional redistricting. *Reynolds* involves an interpretation only of the Equal Protection Clause, which is the constitutional provision which governs state legislative redistricting. Congressional districts are to be judged not only by the requirements of the Equal Protection Clause, but also by the far more stringent limitations of Article I, Section 2, of the Constitution. *E.g., Kirkpatrick v. Preisler*, 394 U.S. 526 (1969). If the Equal Protection Clause did allow a state's redistricting procedure to perpetuate old districts past the decennial census, Article I, Section 2 most assuredly would not, absent the emergency circumstances referred to above.

The *reductio ad absurdum* of appellants' "grace period" argument is that it could lead to an *indefinite* perpetuation of congressional districts based on grossly outdated census data. Appellants argue that what they term the "mandate" of Section 2a(c) operates only "in a situation where the legislative process is continuing . . . and cannot be completed by the next election." Appellants' Motion to Stay Enforcement of Judgment And To Advance Case For Argument at 5. A referendum suspending the effect of a redistricting plan produced by the legislative process is, they argue, such a situation. But under California referendum law, the "legislative process" to which appellants refer could continue indefinitely as each successive attempt of the State Legislature to perform congressional redistricting was subjected to the referendum process *ad infinitum*.* Whatever temporary or emergency delays in congressional redistricting might be constitutionally permissible, it cannot

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*The Supreme Court of California explicitly recognized this danger as part of its conclusion that, as a matter of state law, the old districts should not be perpetuated through 1984 or later. *Assembly v. Deukmejian, supra*, 30 Cal.3d at 670.

be doubted that the United States Constitution would not permit the processes of state law to postpone redistricting for four, six or ten years after the decennial census.

D. Even if Section 2a(c) Required the Conduct of Congressional Elections in Those Districts "Then Prescribed by the Law" of California Before the Current Redistricting, the Provision Would Not Apply to This Case.

Section 2a(c)(2), upon which appellants solely rely, states: "if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives *from the districts then prescribed by the law of such state*." (emphasis added).

In enacting the present reapportionment law adopted by the Supreme Court of California, the State Legislature and the Governor repealed the previous congressional boundaries which were designed on the basis of the 1970 census.* Because no referendum was filed against the repeal of the old congressional boundaries, the California Supreme Court found as a matter of state law that "the old congressional district boundaries have been repealed." *Assembly v. Deukmejian, supra,* 30 Cal.3d at 657. The California Supreme Court was thus faced with a situation in which there were no districts then prescribed by the law of the state. The repealed districts had absolutely no status whatsoever in law of California. The so-called mandate of Section 2a(c) consequently could not control the state court's deliberations, as the statute simply cannot be read to require the use of

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*The law containing the repealer of the old districts contains a finding by the Legislature that the old districts were "manifestly malapportioned and unconstitutional." 1981 Cal. Legis. Serv., Chap. 536 (West).

a set of repealed congressional districts lacking any status as state law.

Even if this Court were to accept appellants' argument concerning the role of Section 2a(c), that statute simply could not apply to the facts faced by the Supreme Court of California in this case. The California court's order implementing the 1981 congressional reapportionment law consequently cannot violate Section 2a(c) and no substantial federal question is presented by this appeal.

E. Section 2a(c)'s Authorization of At-Large Elections for Congressional Representatives Was Repealed by the Enactment of 2 U.S.C. Section 2c.

The foregoing discussion has assumed for the purposes of argument that Section 2a(c)'s authorization or mandate of at-large elections in certain circumstances was not implicitly repealed by the passage of Section 2c, which requires that all congressional representatives be elected from single-member districts. Even making that considerable assumption, this appeal clearly does not merit an exercise of this Court's plenary jurisdiction. As the preceding sections of this motion have demonstrated, the insubstantiality of the narrow question presented in this appeal in no way rests on the conclusion that Section 2a(c) has been impliedly repealed. Appellees concur, however, with the judgment below that Section 2c did indeed effect such a repeal. That repeal is a final reason for denying further review of the judgment below and counsels for a summary affirmance of the lower court judgment.

In 1967, Congress expressly forbade the at-large elections formerly sanctioned by Section 2a(c) in language that is clear and unequivocal. In the new Section 2c, Congress required that each state establish "a number of districts equal to the number of Representatives to which such state

is so entitled . . . ." It further mandated that "*[r]epresentatives shall be elected only from districts so established.* . . ." 2 U.S.C. Section 2c (emphasis added). That Congress intended forever to ban the kind of at-large election appellants propose is evident both from this language and from the relevant legislative history.

In the floor debates on the bill which became Section 2c, both Senators and Congressmen made it clear that the effect of 2c was forever to ban at-large elections after 1968. The following exchange between Senators Inouye and Fong typifies these discussions:

> Mr. Fong: "Beginning with the elections in 1970, *no State will elect any Congressmen at large*. That is the substance of this bill."
>
> Mr. Inouye: "Unless the State has one Representative."
>
> Mr. Fong: "Yes . . .
>
> . . . beginning with the 1970 elections, and *for every Congressional election thereafter* every state of the Union, *with no exceptions*, must elect its Congressmen from single-member districts."

113 Cong. Rec. 34364 (Nov. 30, 1967) (emphasis added). In the House debates, Representative Celler summed the matter up neatly: "If [the bill] prevails, there will be no more elections of Representatives at large forever . . . ." 113 Cong. Rec. 34034 (Nov. 28, 1967).*

The prohibition of Section 2c has been acknowledged by many courts. *See Legislature v. Reinecke*, 6 Cal.3d 595, 603 (1972); *Simpson v. Mahan*, 185 S.E.2d 47 (Va. 1971). *See also Whitcomb v. Chavis*, 403 U.S. 124, 158, n.39 (1971); *Preisler v. Secretary of State*, 279 F.Supp. 952,

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**See* the further legislative history to the same effect cited and discussed in *Assembly v. Deukmejian, supra*, 30 Cal.3d at 662-663.

967-68, (W.D. Mo. 1967), *aff'd* 385 U.S. 450 (1967). Section 2c's prohibition of the use of at-large elections and its implicit repeal of Section 2a(c) was acknowledged and applied in two recent cases involving congressional redistricting after the 1980 census. *Shayer v. Kirkpatrick,* No. 81-4144-CV-C (W.D. Mo., Jan. 7, 1982), *Agerstrand v. Austin,* No. 81-40256 (E.D. Mich., Feb. 26, 1982).* The fact that those cases dealt with situations in which a state had lost a representative and thus would have been governed (prior to 2c's enactment) by Section 2a(c)(5), rather than 2a(c)(2), does not supply a material distinction from the instant case, in which a state has gained additional representatives.** In either case, congressional representatives would be elected in the at-large elections Congress sought forever to ban.

Of all the courts that have considered the question, only a dictum from *Carstens v. Lamm,* Civ. No. 81-F-1713 (D. Colo. Jan. 28, 1982) supports the proposition that 2a(c)'s authorization of at-large elections has not been repealed by 2c. And even the *Carstens* court would limit the applicability of 2a(c) to situations in which "no constitutional redistricting plan exists on the eve of a congressional election, and there is not enough time for either the Legislature or the courts to develop an acceptable plan." *Carstens v. Lamm, supra,* typed opn. at 10. Thus, the *Carstens* dictum plainly

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**See also Doulin et al. v. White et al.*, Civ. No. LR-C-81-418 (E.D. Ark. February 22, 1982).

***It should be noted that if any of the provisions of Section 2a(c) could pass constitutional muster it would be subdivision (5). In a situation under subdivision (5) in which all representatives from a state were elected at-large, there is no apparent violation of Section I, Article 2, since all votes would be equally weighted. *See Norton v. Campbell,* 359 F.2d 608 (10th Cir.), *cert. denied,* 385 U.S. 839 (1966). However, under subdivision (2)'s contemplation of a combination of at-large elections and districts based on the previous decade's census, the result is plainly unconstitutional. See Section II.C., *supra.*

would not permit at-large elections to take place in California because a constitutional redistricting plan does exist for the 1982 California congressional elections.*

The language of Section 2c, its legislative history, and the great weight of authority interpreting that Section make clear that at-large elections of congressional representatives are forbidden.** The appellants' contrary contention is meritless and their attempt to impose at-large elections on the people of California by resuscitating 2 U.S.C. Section 2a(c)(2) should be dismissed.

III.

THIS APPEAL INVOLVES A FEDERAL QUESTION ABOUT WHICH NO CONFLICT EXISTS IN THE COURTS.

As explained in the preceding sections of this motion, the question appellants present is an exceedingly narrow one. Appellants argue that Section 2a(c) requires a state court to perpetuate malapportioned congressional districts, supplemented by at-large elections, until the state's legislative redistricting process has run its course, despite the availability of equally populous single-member districts. Appellants also argue that there exists some federal authority for their argument and that this court should assume jurisdiction

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See Section III, *infra*, for a more complete analysis of the *Carstens* dictum.

**Appellants argue that this Court's presumption against implied repeals militates against the conclusion that Section 2a(c) has been repealed by Section 2c. While it is true that implied repeals are disfavored, *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976), it is also true that where the plain meaning of two statutes is irreconcilably repugnant, or where the later act covers the whole subject matter of the earlier and the legislative intent to repeal is manifest, the repeal of the earlier act should be given judicial effect. *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936). Section 2c's legislative history and its unequivocal requirement that all Congressional representatives be elected only from single-member districts plainly satisfies these requirements.

to resolve an alleged conflict between their asserted authority and the judgment of the Supreme Court of California. But the purported authority on which appellants rely, *Carstens v. Lamm*, Civ. No. 81-F-1713 (D. Colo. Jan. 28, 1982), is in fact no authority at all. Indeed, the *Carstens* dictum relied on by appellants is in sharp conflict with the argument they present to this Court.

It is true that the *Carstens* court disagreed with the conclusion of the court below that Section 2c impliedly repealed Section 2a(c). In dictum, the court concluded that Section 2a(c)'s at-large provisions were a "drastic emergency measure" that courts were permitted to impose to relieve a state from the "unconstitutional situation" that would exist when "no congressional redistricting plan exists on the eve of a congressional election." *Carstens v. Lamm, supra*, typed opn. at 10.

But the *Carstens* court did not impose Section 2a(c)'s "emergency remedy." Like the Supreme Court of California, the *Carstens* court found that the state's old congressional districts were indisputedly unconstitutional and that there was a constitutional alternative—a court-created plan that would both comport with the Constitution and provide for single-member districts. It concluded that "[s]ince the posture of this case does not require the use of such a drastic emergency remedy, we find that Section 2a(c)(2) is not applicable here." *Carstens v. Lamm, supra*, typed opn. at 10. Because appellants argue that Section 2a(c) *mandates* the application of its at-large provisions until the "legislative process" has run its course,* the *Carstens* case in fact conflicts with appellants' argument.

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*Colorado's legislative process surely had not run its course when the district court intervened. Several reapportionment plans had been approved by the Legislature, but each plan had been vetoed by the Governor. *Carstens v. Lamm, supra*, at 2-7.

Indeed, the *Carstens* court explicitly rejected the argument made here by appellants. The *Carstens* opinion clearly indicates that Colorado Secretary of State Buchanan argued to that court that it was *bound* to defer to the supposed "directives" of Section 2a(c). *Carstens, supra,* typed opn. at 9. Equally clearly, the court rejected Buchanan's argument. Thus, the *Carstens* opinion explicitly rejected the very proposition for which appellants cite it. No conflict exists among the courts concerning the question raised in this appeal.

IV.
CONCLUSION.

For all of the foregoing reasons, the appeal from the judgment of the Supreme Court of the State of California should be dismissed or, in the alternative, this Court should affirm that judgment without plenary review.

Dated: April 7, 1982.

Respectfully submitted,

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Motion to Dismiss or Affirm

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No. 81-1641

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

REPUBLICAN NATIONAL COMMITTEE,
TIRSO DEL JUNCO, CHAIRMAN,
CALIFORNIA REPUBLICAN PARTY,
Appellants,

v.

PHILLIP BURTON, et al.,
Appellees.

ON APPEAL FROM THE SUPREME
COURT OF CALIFORNIA

MEMORANDUM OF APPELLEE DEUKMEJIAN IN SUPPORT OF JURISDICTIONAL STATEMENT AND MOTION TO EXPEDITE PLENARY CONSIDERATION

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Appellees.

MEMORANDUM OF APPELLEE DEUKMEJIAN IN SUPPORT OF JURISDICTIONAL STATEMENT AND MOTION TO EXPEDITE PLENARY CONSIDERATION

STATEMENT

George Deukmejian in his capacity as Attorney General of California was a respondent in the original action before the California Supreme Court from whose judgment this appeal has been taken by the real parties in interest, Republican National Committee and Tirso Del Junco, in his capacity as Chairman of the California Republican Party. By operation of this Court's rule 10.4, the Attorney General is an appellee in the matter before the Court.

Pursuant to rule 10.4 the Attorney General states his full support of appellants' position as set forth in their jurisdictional statement, motion to expedite consideration of the jurisdictional statement and plenary review of the merits and the supplement thereto. The Attorney General submits that the points and authorities expounded in those documents identify critical federal questions which warrant urgent consideration on the merits and a stay of the mandate of the California Supreme Court which is based exclusively on an erroneous resolution of a federal question.

The federal questions identified by appellants are whether 2 U.S.C. section 2c constitutes a repeal of 2 U.S.C. section 2a(c)(2) by implication, and if not, whether the order of the court below that new congressional seats be filled by election from districts conflicts with section 2a(c)(2). The court below held that there had been such a repeal.

The Attorney General agrees with appellants that the holding of the court below invalidating section 2a(c)(2) is erroneous and that in the circumstances presented to the court below section 2a(c)(2) requires the two additional seats in the United States House of Representatives which were allotted to California as a result of the 1980 census to be filled by election from the state electorate at large and the other forty-three (43) existing seats to be filled by election in the districts represented in the current session of Congress.

The jurisdictional statement (pp. 12–15) clearly dem-

onstrates that the court below failed to apply the standards adopted by this Court for determining whether one federal statute has repealed another by implication and that application of this Court's standards requires the conclusion that section 2a(c)(2) has not been repealed by implication.

Election of the additional two representatives by the electorate of the state at large and the pre-existing allotment of 43 from districts represented in the current session of Congress in the 1982 congressional elections in California as mandated by section 2a(c)(2) is consistent with all applicable provisions of the United States Constitution. (Jurisdictional Statement, pp. 16–17.) The United States Constitution does not require that congressional districts comply with the one-man-one-vote principle mandated by the United States Constitution in the first election following the federal decennial census so long as the state's preordained procedure for accomplishing redistricting has been invoked and is proceeding. (See *Reynolds* v. *Sims* (1964) 377 U.S. 533, 570, 583–587.) It should be noted that the existing districts have been in effect for less than ten years and were constitutionally valid when enacted. (*Assembly* v. *Deukmejian* (1982) 30 Cal.3d 638, 657; 180 Cal.Rptr. 297, 309.)

The opinion of the court below supporting its mandate that all United States Representatives from California be elected from districts in the 1982 elections manifests its rationale that this result is compelled by section 2c based on the erroneous conclusion that sec-

tion 2c repealed section 2a(c)(2) by implication. (30 Cal.3d at 662–664; 180 Cal.Rptr. at 311–313.) There is no question that the court below considered itself bound by the Supremacy Clause to follow section 2c (30 Cal.3d at 663–664; 180 Cal.Rptr. at 313); its reasoning compels the conclusion that if it had not considered section 2a(c)(2) repealed by implication it would have been bound to follow the mandate of that section.

There is, and could be, no adequate independent state ground for interrupting the state legislative process of redrawing the California congressional district boundaries. Section 4(1) of article I of the United States Constitution vests the authority to prescribe "the times, places and manner of holding elections for Senators and Representatives" in the legislative power of a state subject to regulation by Congress.[1] (See *Roudebush* v. *Hartke* (1972) 40 U.S. 15, 19, 23–26.) The authority conferred by section 4(1) includes the power to define congressional district boundaries. (*Wesberry* v. *Sanders* (1964) 376 U.S. 1, 4, 16.)

Due to this constitutional vesting of authority in the legislative power of a state, Congress could not redistribute that authority to the judicial or executive powers of a state although it might preempt state involvement altogether. Thus, the only restraints on the authority of

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[1] United States Constitution article I, section 4(1) provides that:

"The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

a state's legislative power to define congressional district boundaries are Congress and judicial application of other provisions of the United States Constitution.

The court below acknowledged that the referendum procedure is as much a part of the legislative process prescribed by the California Constitution for accomplishing redistricting as is passage by both houses of the California Legislature and approval by the Governor. (30 Cal. at 654–657; 180 Cal.Rptr. at 306–308.) The court below also recognized that its intervention in the reapportionment process could be justified only if a provision of federal law mandated the interruption of that process. (30 Cal.3d at 659; 180 Cal.Rptr. at 310.)

Although the existing congressional districts were no longer officially defined by state statute at the time of the proceedings below (30 Cal.3d at 657; 180 Cal.Rptr. at 309), that is irrelevant to application of section 2a(c)(2) because the word "then" in the phrase "shall be elected from districts then prescribed by the law of such State" refers to the districts existing at the time the new apportionment of representatives is made by Congress pursuant to subdivisions (a) and (b) of section 2a, i.e., the districts from which the existing representatives were elected.

Thus, there is no constitutionally sufficient basis for the mandate of the court below except its erroneous conclusions regarding the implied repeal of section 2a(c)(2) and the time within which reapportionment must be accomplished pursuant to the U.S. Constitution. Both of the bases for the lower court's decision are exclusively federal questions.

CONCLUSION

The Attorney General submits that this Court should hear and resolve the issue regarding the viability of section 2a(c)(2) on the merits. The issue has occurred in several other cases currently pending which are cited in the jurisdictional statement (pp. 7–11, n. 3) and is thus demonstrably certain to recur in subsequent decennial reapportionments. If section 2a(c)(2) is determined to be viable, the need for judicial intervention in the conduct of congressional elections immediately following the decennial census would be greatly diminished.

Respectfully submitted,

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